ATTACHMENT A

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DPI TELECONNECT, LLC COMPLAINANT V. BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T KENTUCKY DEFENDANT	)))))))))	CASE NO. 2005-00455

O R D E R

This case is before the Commission on the complaint of dPi Teleconnect, L.L.C. ("dPi") against BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky"). The graveman of the complaint focuses on the parties' relationship governed by the parties' interconnection agreement and centers on alleged credits due dPi from AT&T Kentucky as a result of dPi's reselling of services subject to AT&T Kentucky's promotional discounts. dPi claims it is entitled to credits for a promotion AT&T Kentucky offered to its end users. AT&T Kentucky claims that dPi is not entitled to the credits because dPi did not meet the terms for the promotion, and thus did not qualify for the credits.

The parties have conducted extensive discovery. Both parties have filed testimony and final briefs. Additionally, both parties have waived the right to a formal hearing. The case is now ripe for a decision.

Procedural Background

dPi filed its complaint against AT&T Kentucky on November 9, 2005. On January 30, 2006, AT&T Kentucky and dPi filed a joint motion to hold the case in abeyance. As grounds for their motion, the parties stated that a similar case was being litigated before the North Carolina Utilities Commission and that dPi and AT&T Kentucky had reached an agreement to abate similar proceedings in Kentucky and seven other states pending a final order from the North Carolina Commission.[1]

The North Carolina Utilities Commission ("NCUC") issued a dispositive Order on June 7, 2006, a copy of which AT&T Kentucky filed with the Commission on June 13, 2006.[2] The NCUC dismissed dPi's complaint finding that, because AT&T did not extend the promotion to customers that were similarly situated to dPi's customers, dPi was not entitled to the promotional discount. The United States District Court for the Eastern District of North Carolina subsequently upheld the NCUC's determination.[3]

A hearing was scheduled and delayed several times at the request of all parties because they were litigating similar issues in several other states. Most recently, the parties delayed any hearings because AT&T Kentucky's counsel, who had handled the similar litigation in the other states, retired and AT&T Kentucky requested additional

[1] Joint Motion to Abate at 1-2.

[2] AT&T Kentucky Responses to dPi's Data Requests, Item No. 1-9.

[3] *dPi Teleconnect, L.L.C. v. Sanford et al.*, Case No. 5:06-CV-463-D 2007 WL 2818556 (W.D. N.C. 2007)

time so that a new attorney might prepare for the case. Ultimately, the parties jointly moved to cancel the scheduled hearing and submit the case on briefs.[4]

Case Summary

dPi is a competitive local exchange carrier ("CLEC") that purchases services from AT&T Kentucky and resells them to its own customers. dPi operates as a prepaid company that offers service to credit-challenged customers.[5] AT&T Kentucky is an incumbent local exchange carrier ("ILEC") and, as such, has a duty to offer any services that it offers to its customers to dPi at wholesale rates so that dPi may resell those services to its own customers. 47 U.S.C. § 251(c)(4)(A). AT&T Kentucky's resale obligations extend to promotional discounts offered on retail communication services that extend for periods in excess of 90 days. 47 C.F.R. § 51.613(a)(2).

The details of the resale are governed by the parties' interconnection agreement,[6] in which dPi essentially functions as a customer of AT&T Kentucky by purchasing the telecommunications service and then reselling it to dPi's customers. The dispute arises under the interconnection agreement and centers on alleged credits due dPi as a result of dPi's reselling of services allegedly subject to AT&T Kentucky promotional discounts. AT&T Kentucky denies that dPi was eligible for the promotional

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[4] dPi also filed a motion for an extension of time in which to file its brief. The briefs were due to be filed on March 19, 2010. dPi filed its motion and brief on April 1, 2010.

[5] Direct Testimony of Tom O'Roark at 14.

[6] The parties operated under two agreements during the period of the dispute. Once one agreement expired, another agreement was executed. The terms in the agreements are similar and the fact that there are two agreements does not affect the outcome of this case.

credits. The dispute centers on a specific promotion offered from January 2001 until November 2005.

From January 2001 until November 2005, AT&T Kentucky offered a promotion called "Line Connection Charge Waiver" ("LCCW") whereby AT&T Kentucky would waive a new customer's line connection charge if the customer ordered basic service in addition to purchasing two or more "Touchstar" features.[7] Pursuant to the interconnection agreement, dPi customers who qualify for the LCCW, also receive the waiver.[8] The dPi customer, however, does not receive the benefit of the credit. dPi receives the benefit of the LCCW waiver by paying a lower price to AT&T Kentucky for the purchased service. dPi claims that it is entitled to approximately $44,993.11 in credits.[9] AT&T Kentucky denies this claim.

When applying the discount, AT&T Kentucky customers receive the LCCW from inception. CLECs pay the wholesale price for resale, subsequently determine which of their customers qualify for the LCCW, and submit an application to AT&T Kentucky for the discounts, which AT&T Kentucky provides in the form of credits to the CLECs' accounts.[10]

The parties' interconnection agreement provides that:

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[7] Exhibit PLF-2 (Letter to the Commission dated December 7, 2005).

[8] Exhibit A to the Resale Attachment to the Interconnection Agreement.

[9] Complaint at 2, Direct Testimony of Tom O'Roark at 17.

[10] O'Roark Direct Testimony at 7.

> [W]here available for resale, promotions will be made available only to End Users who would have qualified for the promotion had it been provided by AT&T Kentucky directly.[11]

AT&T Kentucky claims it only applies the LCCW for customers who order two or more "TouchStar" features for which an additional charge is made.[12] AT&T Kentucky's tariff contains many vertical features described as "TouchStar" features. Some of the features deemed as "order blocking" (return block, repeat dialing block and call tracing block) are provided at no charge. These free features block a customer from accessing the call return, repeat dialing and call tracing TouchStar features for which the customer would have to pay an additional charge.[13]

dPi provides the "order blocking" features free of charge to its customers and, therefore, argues that those customers qualify for the LCCW. dPi's customers do not request the order blocking features; dPi automatically provides the blocking features.[14] AT&T Kentucky argues that, because those TouchStar features are provided at no charge, even to its own customers, the LCCW should not be credited for those dPi customers. AT&T Kentucky also argues that it does not provide its own customers the LCCW for those customers that order blocking features out of the TouchStar tariff.

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[11] Exhibit A to the Resale Attachment to the Interconnection Agreement.

[12] Direct Testimony of Ferguson at 50.

[13] AT&T Kentucky Tariff, Section A13.19.2A.

[14] Exhibit A to AT&T Kentucky's Brief, 2006 NCUC Transcript at 81-82.

dPi's Position

dPi argues that it is entitled to the promotional credits because an order for basic service plus blocking features qualifies for the promotion pursuant to the promotion's plain language and AT&T Kentucky's original interpretation of that language.[15]

dPi argues the plain language of the promotion states a qualifying order includes the purchase of BellSouth basic service and two custom calling (or TouchStar service) local features. dPi further argues that call return block ("BCR"), repeat dialing block ("BRD"), and call tracing block ("HBG") are all TouchStar services.[16] Because dPi's basic service always includes at least two TouchStar blocking features, dPi argues that its customers are always qualified for the promotion and thus for the promotional credits.[17]

dPi also argues that blocks are features because:

1. AT&T Kentucky employees referred to blocks as features in communications with dPi; and,

2. Blocks are identified as "features" in AT&T Kentucky's tariff; specifically, BCR, BRD, and HBG are described and have their own Universal Service Ordering Code ("USOC") in the TouchStar section of AT&T Kentucky's tariff.[18]

dPi argues that AT&T Kentucky is imposing additional terms not in the promotion when it argues that blocking does not qualify for the promotion because it is not

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[15] dPi Final Brief at 3.

[16] dPI Final Brief at 4-6.

[17] Id. at 7-8.

[18] dPi Final Brief at 6.

purchased for a separate amount. The promotion's plain language does not require the features to be purchased separately. dPi also claims that if AT&T Kentucky actually meant to exclude blocks from the promotion, it would have drafted limiting language listing features expressly excluded or included in the promotion.[19]

dPi refutes AT&T Kentucky's claim that payments to other CLEC's with orders for basic service plus blocking features were mistakes or the result of "stealing" by CLECs with the allegation that AT&T Kentucky never attempted to backbill or collect the promotion credits paid in error.[20]

Additionally, dPi argues that the evidence in the record (from discovery in the Florida proceeding) document that AT&T provided waivers to retail customers with orders for basic service plus blocking features. dPi further argues that AT&T has not produced evidence that the waivers were due to reasons other than the promotion.[21]

Lastly, dPi argues that it is entitled to the same offers made to AT&T Kentucky customers regardless of how dPi repackages or markets those services. Conditioning dPi's eligibility for the promotion upon whether dPi customers specifically request the features violates the law, because AT&T Kentucky must make available to CLECs whatever offers it makes to its customers, dPi argues that this condition also violates the terms of the parties' interconnection agreement.[22]

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[19] Id. at 8, 9.

[20] Id. at 10-11.

[21] Id. at 12-13.

[22] Id. at 13-15.

AT&T Kentucky's Position

AT&T Kentucky argues that blocks are not the same thing as features. Thus, dPi's end users did not qualify for the promotion and dPi is not entitled to credits for the promotion. AT&T Kentucky has four main arguments as to why dPi is not entitled to the promotional credits.

First, AT&T Kentucky argues that dPi end users must meet the same promotion criteria as AT&T Kentucky end users. dPi is not entitled to promotional credits because its end users did not qualify under the terms of the promotion.[23]

Second, AT&T Kentucky asserts that the parties' interconnection agreement provides that resale promotions are available only to end users who would have qualified had the promotion been offered by AT&T Kentucky and AT&T Kentucky does not consider blocks to be features. Therefore, the purchase of basic service and two blocks is not the equivalent of the purchase of basic service and two features.[24]

Third, AT&T Kentucky argues that its end user who ordered only basic service and two blocks would not qualify for the promotion. Likewise, dPi's end users who ordered basic service and two blocks did not qualify for the promotion. (Under this argument, it does not matter whether dPi or its end users ordered the blocks). Thus, dPi end users did not qualify for the promotion. Because dPi end users did not qualify for the promotion, dPi is not entitled to the promotional credits.[25]

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[23] AT&T Kentucky Brief at 8.

[24] Id. at 12-14.

[25] Id. at 12.

Lastly, AT&T Kentucky argues that, because blocks are not features themselves, dPi does not qualify for promotional credits.[26]

AT&T Kentucky points to the price structure in its Tariff and Price List to highlight the difference between a block and a feature. Features are services offered in addition to basic service. Features are priced accordingly with a charge above and beyond basic telephone service. In contrast, blocks, although listed under TouchStar features, are offered to end users free of charge.[27] The price difference reflects the different purpose of a block. A block prevents the end user from accessing additional services and thus accruing charges beyond the price for basic service.[28]

AT&T Kentucky argues that the promotion required the purchase of features. Neither dPi nor its end users purchased the blocks.[29] AT&T Kentucky asserts that the promotion required end users to <u>purchase</u> additional services at an additional price. The blocks are provided free of charge and because the blocks dPi ordered for its end users were provided free of charge by AT&T Kentucky, the blocks are not purchased features. Because no services were purchased, AT&T Kentucky argues the terms of the promotion were not met and dPi is not entitled to promotional credits.[30]

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[26] <u>Id.</u> at 9-11.

[27] Exhibit PLF-4, AT&T Kentucky Tariff, Section A13.19.2.A to P.

[28] AT&T Kentucky notes that its position that a block is not a feature itself has been upheld in federal district court in Florida in *dPi Teleconnect, L.L.C. v. Florida Public Service Commission*, Case No. 4:08-cv-00509, 2009 WL 2603144 (N.D. Fla. 2009).

[29] AT&T Kentucky Brief at 12, Exhibit PLF-2 (Letter to Commission dated December 7, 2005.)

[30] <u>Id.</u> at 13.

AT&T Kentucky also argues that the promotional order must be the result of an actual order from an end user. As noted above, the parties' interconnection agreement provides that promotions available for resale are available only to end users who would have qualified had the promotion been offered by AT&T Kentucky. AT&T Kentucky argues that this term implicitly requires that dPi treat its end users just as AT&T Kentucky does. AT&T Kentucky requires that the order result from an actual order placed by an end user. AT&T Kentucky argues that dPi's end users placed none of dPi's orders; they were placed by dPi itself without the knowledge of its end users. Because dPi, and not its end users, placed the orders, dPi end users do not qualify for the promotion and dPi is not entitled to the promotional credits.[31]

AT&T Kentucky also raises four other issues. First, AT&T Kentucky asserts that it did not provide promotional credits to its end users who purchased basic service and requested free blocks. Discovery in a separate action in Florida documents that AT&T (in various states) waived charges, including line connection charges, when customers ordered basic service and call blocks. However, AT&T Kentucky argues this was not part of the promotion at issue but was due to other reasons, such as natural disasters, bill splitting provisions, and errors.[32]

Second, AT&T Kentucky asserts that its mistaken payments of promotional credits to other CLECs does not entitle dPi to receive promotional credits. AT&T Kentucky states it relied on an honor system in processing promotional credits until it discovered that some CLECs received credits to which they were not entitled. AT&T

[31] Id. at 13-14.

[32] Id. at 15-17.

Kentucky revamped its procedures to ensure all credit requests actually qualified for the promotional credit. AT&T Kentucky argues that its mistake is not a valid basis to award credits to dPi for which it is not entitled.[33]

Third, AT&T Kentucky asserts that it never agreed with dPi's interpretation of the language of the promotion that blocking was a feature. It argues that dPi erroneously equated AT&T Kentucky's confirmation of receipt of electronic submission of credit request with approval of dPi's credit request, and thus an agreement with dPi's interpretation of the promotion terms.[34]

Fourth, AT&T Kentucky asserts that it did not deny dPi's credit requests because the amounts were large. Credit request payments were delayed while AT&T Kentucky verified the same qualifying criteria being applied to CLEC's promotional credit requests as to retail customers. AT&T Kentucky denies any intent to avoid paying the promotions.[35]

Discussion

Under AT&T Kentucky's procedures, dPi pays the wholesale price for services and then applies for promotional credits. In this instance, dPi purchased basic service from AT&T Kentucky and instructed AT&T Kentucky to block all features that customers could use on a charge-per-use basis; features such as call return, repeat dialing and call tracing. dPi "ordered" these free blocks under the Touchstar services tariff. dPi ordered the blocks because dPi sells prepaid phone services to non-credit-worthy

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[33] Id. at 19-20.

[34] Id. at 20.

[35] Id. 21-22.

customers. dPi ordered the blocks, not as additional services or features for its customers, but to prevent its customers from incurring additional charges, charges that dPi would be hard pressed to recover. As the District Court noted in the North Carolina action, "[e]ssentially, dPi blocks features that could result in a per-use charge in order to make more money.[36]

The primary language of the interconnection that governs this complaint states:

> Where available for resale, promotions will be made available only to End Users who would have qualified for the promotion had it been provided by [AT&T Kentucky] directly.[37]

Pursuant to the clear language of the above provision, promotions are <u>only</u> available to the extent that end users would have qualified for the promotion if the promotion had been provided by AT&T Kentucky directly. Thus, if AT&T Kentucky did not provide a promotional discount to its customers, then dPi is not entitled to the credit. AT&T Kentucky, via its written testimony, asserts that it does not extend the LCCW promotion to its end users that order only blocks in addition to basic service.

dPi presented evidence from the parallel proceedings in Florida and North Carolina. In the Florida proceeding, dPi presented evidence that some AT&T Florida customers that ordered basic service and blocking features received the LCCW. AT&T Florida explained that those occasions were anomalies caused by billing errors caused by natural disasters in Florida during a particularly active time of tropical weather. The Florida Commission dismissed dPi's complaint, finding that, in order for a customer to

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[36] *dPi Teleconnect, L.L.C. v. Sanford et al.*, Case No. 5:06-CV-463-D, 2007 WL 2818556 (W.D. N.C. 2007) *2.

[37] Exhibit A to the Resale Attachment to the Interconnection Agreement.

qualify for the LCCW, the customer had to purchase TouchStar features for an additional price. The Florida Commission concluded that, because the blocking features were not purchased at an additional price, they did not qualify a customer solely ordering those features for the LCCW. The United States District Court for the Northern District of Florida upheld the Florida Commission's determination.

In the North Carolina proceeding, AT&T North Carolina argued that, in the cases where it extended LCCW credits to CLECs that did not qualify, it was due to the CLECs' dishonesty in applying for credits to which they were not entitled (up and until that point AT&T[38] had relied on an "honor" system for the request of credits). When AT&T changed the verification procedures for receiving promotional credits, the anomalies were eliminated.

Despite the two exceptions listed above (which did not occur in Kentucky), dPi has presented no evidence that AT&T Kentucky extends the LCCW to its customers that order only basic service and blocking features. Specifically, dPi presents no evidence that AT&T Kentucky incorrectly extended such credits to its customers in Kentucky. The lack of contradictory evidence is dispositive; dPi cannot sustain its case

[38] The changes in the verification procedure occurred in all of the AT&T entities that formerly composed BellSouth.

against AT&T Kentucky.[39]

Based on the above and on dPi's lack of evidence refuting AT&T Kentucky's assertions, the Commission finds that dPi's complaint against AT&T Kentucky should be dismissed.

IT IS THEREFORE ORDERED that:

1. This case is dismissed and removed from the Commission's Docket.

2. dPi's motion for an extension of time in which to file its brief is granted, and the brief is accepted for filing as of April 1, 2010.

3. This is a final and appealable order.

By the Commission

ENTERED
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KENTUCKY PUBLIC SERVICE COMMISSION

ATTEST:

Executive Director

[39] Even if dPi could prove that AT&T Kentucky had extended some of those credits, its arguments would still fail. The Commission finds that the blocks are not features as contemplated by the promotion. In doing so, the Commission agrees with the Florida District Court which concluded that the:

> [B]locks of features placed on phone lines by dPi, without their customers request or consent, were not the same as features purchased by customers. To the contrary, the blocks actually prevent features from being accessed by the customers.

dPi Teleconnect L.L.C. v. The Florida Public Service Commission at al. and Bellsouth Telecommunications d/b/a AT&T Florida, United States District Court for the Northern District Court of Florida, Case no. 4:08-cv-00509-RS-WCS, Order at 2 (Issued August 21, 2009.)

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

dPi TELECONNECT, LLC,

Plaintiff,

vs. **CASE NO. 4:08-cv-509/RS-WCS**

THE FLORIDA PUBLIC SERVICE COMMISSION, KATRINA J. MCMURRIAN, NANCY ARGENZIANO, AND NATHAN A. SKOP IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION, and

BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a AT&T FLORIDA,

Defendants.

_______________________________________/

ORDER

Before me are Plaintiff dPi Teleconnect's Initial Brief (Doc. 27) and Reply Brief (Doc. 34), Defendant Bellsouth Telecommunications' Answer Brief (Doc. 32), and Defendant Florida Public Service Commission and Commissioners' Answer Brief (Doc. 31). This is an appeal of the Final Order of the Florida Public Service Commission, PSC-08-0598-FOF-TP, issued on September 16, 2008.

The Public Service Commission's findings and interpretations of federal law are reviewed *de novo*. *MCI Worldcom Communications, Inc. v. Bellsouth*

EXHIBIT
A

Telecommunications, Inc., 446 F.3d 1164, 1170 (11th Cir. 2006). The factual findings of the Commission are given deference and reviewed only under an "arbitrary and capricious" standard. *Id. See also MCI Telecommunications Corporation, et. al. v. Bellsouth Telecommunications, Inc.*, 112 F. Supp. 2d 1286, 1290 (N.D. Fla. 2000).

The issue in dispute between the parties was whether "blocks" of features placed by dPi on its customers' phone lines were "features" that entitled dPi to the Line Connection Charge Waiver promotion pricing from BellSouth. The Commission concluded that the blocks of features were not features themselves, and thus dPi was not entitled to the promotional pricing from BellSouth. This was a factual determination, not an interpretation of federal law and the Federal Telecommunications Act, therefore the Commission's decision will be reviewed under the "arbitrary and capricious" standard. *MCI Worldcom Communications, Inc. v. Bellsouth Telecommunications, Inc.*, 446 F.3d 1164, 1170 (11th Cir. 2006).

I find the Commission had a reasonable basis for making this determination. The Commission was not arbitrary or capricious in its determination that blocks of features placed on phone lines by dPi, without their customers' request or consent, were not the same as features purchased by customers. To the contrary, the blocks actually prevented features from being accessed by the customer. Because the blocks were not features, nor were they requested by dPi's customers, it was reasonable for the Commission to determine that dPi was not entitled to receive the promotion pricing for a BellSouth promotion requiring the purchase, by a customer, of a telephone line and two features. The Commission's finding was supported by substantial evidence and it was not unreasonable. Therefore, its decision will not be disturbed.

The determination made by the Florida Public Service Commission in this case was entirely factual and did not involve any interpretation of federal law. However, I find that that the position taken by BellSouth does not violate any federal law provisions. Thus, even if a higher standard of review was required, the Commission's decision would still stand.

The relief requested by Plaintiff is **denied.** The Final Order of the Florida Public Service Commission is **affirmed.**

ORDERED on August 21, 2009.

/s/ Richard Smoak
RICHARD SMOAK
UNITED STATES DISTRICT JUDGE

Slip Copy, 2011 WL 327071 (C.A.4 (N.C.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 2011 WL 327071 (C.A.4 (N.C.)))

HOnly the Westlaw citation is currently available.This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)

United States Court of Appeals,
Fourth Circuit.
DPI TELECONNECT LLC, Plaintiff-Appellant,
v.
Robert V. OWENS, Jr.; Sam J. Ervin, IV; Lorinzo L. Joyner; James Y. Kerr, II; Howard N. Lee; William T. Culpepper, III; Edward S. Finley, Jr., Chairman, in their official capacities as Commissioners of the North Carolina Utilities Commission; Bellsouth Telecommunications, Incorporated, Defendants-Appellees,
and
Jo Anne Sanford; Robert E. Kroger, Defendants.
DPI Teleconnect LLC, Plaintiff-Appellant,
v.
Robert V. Owens, Jr.; Sam J. Ervin, IV; Lorinzo L. Joyner; James Y. Kerr, II; Howard N. Lee; William T. Culpepper, III; Edward S. Finley, Jr., Chairman, in their official capacities as Commissioners of the North Carolina Utilities Commission; Bellsouth Telecommunications, Incorporated, Defendants-Appellees,
and
Jo Anne Sanford; Robert E. Kroger, Defendants.

Nos. 07-2066, 09-1617.
Argued Oct. 28, 2010.
Decided Feb. 3, 2011.

Background: Competitive local exchange carrier (CLEC) brought suit seeking declaratory and injunctive relief from an order of the North Carolina Utilities Commission (NCUC) denying the CLEC's claim for promotional credits from an incumbent local exchange carrier (ILEC). The United States District Court for the Eastern District of North Carolina, James C. Dever III, J., 2007 WL 2818556, granted summary judgment against the CLEC, and it appealed.

Holding: The Court of Appeals, Gregory, Circuit Judge, held that record supported NCUC's interpretation of an interconnection agreement (ICA), under which the CLEC was not entitled to promotional credits from the ILEC.

Affirmed

West Headnotes

[1] Telecommunications 372 870(1)

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k870 Proceedings
372k870(1) k. In General. Most Cited Cases

Record supported North Carolina Utilities Commission's (NCUC) interpretation of an interconnection agreement (ICA), under which a competitive local exchange carrier (CLEC) was not entitled to promotional credits from an incumbent local exchange carrier (ILEC) because the ILEC's own end users would not have been entitled to the sorts of promotions for which the CLEC applied; the ILEC's director of regulatory organization testified without contradiction that the ILEC did not count 'blocks' as features, since "[i]t really doesn't make any sense for [ILEC] to develop a promotion to entice customers to buy additional service when the enticement only applies to something that's already free." Telecommunications Act of 1996, § 101 et seq., 47 U.S.C.A. § 251 et seq.

[2] Federal Courts 170B 915

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)7 Waiver of Error in Appellate Court
170Bk915 k. In General. Most Cited Cases

Appellant waived claim that district court erred in denying its motion for relief from judgment by failing to argue the issue; appellant mentioned issue only once in its opening brief, in its statement of facts, and did not raise the issue at all in its reply brief, and at no point offered any argument as to why the district court erred in denying the motion. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:06-cv-00463-D).**ARGUED:**Anton Christopher Malish, Malish & Cowan, LLP, Austin, Texas, for Appellant. Matthew Patrick McGuire, Alston & Bird, LLP, Raleigh, North Carolina; Karen Elizabeth Long, Carrboro, North Carolina, for Appellees. **ON BRIEF:**David S. Wisz, Bailey & Dixon, LLP, Raleigh, North Carolina, for Appellant. Roy Cooper, North Carolina Attorney General, Raleigh, North Carolina, for Appellees Utilities Commissioners. Anitra Goodman Royster, Alston & Bird, LLP, Raleigh, North Carolina, for Appellee BellSouth Telecommunications, Incorporated.

Before NIEMEYER and GREGORY, Circuit Judges, and DAMON J. KEITH, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

Affirmed by unpublished opinion. Judge GREGORY wrote the opinion, in which Judge NIEMEYER and Senior Judge KEITH joined.
Unpublished opinions are not binding precedent in this circuit.
GREGORY, Circuit Judge:

***1** This case involves a dispute over promotional credits between dPi Teleconnect LLC ("dPi") and BellSouth Telecommunications, Inc. ("BellSouth"). The North Carolina Utilities Commission ("NCUC") dismissed dPi's complaint and motion for reconsideration, and the district court granted the NCUC's and BellSouth's motions for summary judgment. We affirm the district court because there is substantial support in the record that dPi was not entitled to promotional credits.

I.

The Telecommunications Act of 1996 ("the Act") regulates Incumbent LECs ("ILECs") and Competitive LECs ("CLECs"). 47 U.S.C. § 251 et seq. The Act was "designed to enable new Local Exchange Carriers [ ] to enter local telephone markets with ease and to reduce monopoly control of these markets and increase competition among providers." *Verizon Md. v. Core Communications,* --- F.3d ---- (4th Cir.2010), slip op. at 1 (citations omitted) (unpublished). The Act requires, in pertinent part, that ILECs "offer for resale at wholesale rates any telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4). ILECs' resale obligations extend to promotional offers which last for more than 90 days. 47 C.F.R. § 51.613.

The Act employs InterConnection Agreements ("ICAs" or "the agreement") as its primary enforcement vehicle. *Verizon Md., Inc. v. Global Naps,* 377 F.3d 355, 364 (4th Cir.2004). "When an agreement ... is submitted to the state commission for approval, the commission may reject it only if it discriminates against a carrier not a party, or it is not consistent with 'the public interest, convenience, and necessity.' " *Id.* And "[o]nce the agreement is approved, the 1996 Act requires the parties to abide by its terms." *Id.*

Here, BellSouth and dPi functioned as ILEC and CLEC, respectively, and entered into an ICA so dPi could resell retail telephone services on a prepaid basis. The ICA stated, in pertinent part, "[w]here available for resale, promotions will be made available only to End Users who would have qualified for the promotion had it been provided by BellSouth directly." From January 2004 through November 2005, BellSouth offered a promotion known as the Line Connection Charge Waiver ("LCCW"). The promotion read as follows:

Planned Promotion

The Line Connection Charge Waiver promotion is extended to December 26, 2005. Services included in this promotion are:

- BellSouth® Complete Choice® plan
- BellSouth® PreferredPack SM plan
- BellSouth® basic service and two (2) customer calling (or Touchstar® service) local features

Promotion Specifics

Specific features of this promotion are as follows: Waived line connection charge to reacquisition or winover residential customers who currently are not using BellSouth for local service and who purchase BellSouth® Complete Choice® service, BellSouth® PreferredPack SM service, or basic service and two (2) features will be waived.

Restrictions/Eligibility Requirements:

***2** ...

The customer must switch their local service to BellSouth and purchase any one of the following: BellSouth® Complete Choice® plan, BellSouth® PreferredPack SM plan, or BellSouth® basic service and two (2) custom calling (or Touchstar® service) local features.

BellSouth's North Carolina General Subscriber Service Tariff ("the Tariff") further describes "Touchstar® service [a]s a group of central office call management features offered in addition to basic telephone services." The Tariff defines "features" to include twelve functionalities: (1) call return; (2) repeat dialing; (3) call tracing; (4) call selector; (5) preferred call forwarding; (6) call block; (7) basic caller ID; (8) deluxe caller ID; (9) anonymous call rejection; (10) calling name/number delivery blocking-per line; (11) calling name/number delivery blocking-per call; and (12) busy connect. In another section on rates, the Tariff describes "denial of per use" call return and call tracing, refers to them as "features" in a footnote, and lists their respective Universal Service Order Codes (USOCs).

dPi proceeded to purchase basic service from BellSouth and instructed BellSouth to block certain features ("blocks") that customers could use on a charge-per-use basis. dPi did so because it sold pre-paid phone services to customers who were not creditworthy, and it might have trouble recouping payment for bills after the fact for charge-per-use features. dPi specifically asked BellSouth to block call return (known by its USOC, "BCR"), repeat dialing ("BRD"), and call tracing ("HBG"), and BellSouth agreed. dPi resold the basic service and 'blocks' to customers as a single pre-paid package.

dPi then applied to BellSouth for promotional credits under the LCCW. BellSouth denied the applications because dPi's customers had not purchased basic service and two or more features other than 'blocks.' Next, dPi filed a complaint before the NCUC, alleging it was entitled to promotional credits. Before the NCUC, BellSouth's director of regulatory organization, Ms. Pam Tipton, testified that only paid features qualify for LCCW and that 'blocks' are not eligible for such credits. The NCUC decided that they were "not required to analyze and decide this case based on the language of the promotion" because "BellSouth and dPi jointly agreed [that] ... 'promotions will be made available only to End Users who would have qualified for the promotion had it been provided by BellSouth directly.' " Instead, the NCUC found Ms. Tipton's testimony was "dispositive" and "uncontested by dPi at the hearing and unrebutted in its post hearing brief."

The NCUC dismissed dPi's complaint, reasoning that "[u] nder the clear terms of the interconnection agreement and the facts of this case, dPi end users who only order blocking features are *not* eligible for the credits because similarly situated BellSouth End Users are not entitled to such credits." The NCUC declined to construe any potentially ambiguous provisions against the drafter (BellSouth) because dPi voluntarily agreed to more specific terms in the ICA. While the NCUC acknowledged problems in BellSouth's overall system for requesting promotion credits, it suggested another type of proceeding would be a more appropriate forum for resolving them. dPi moved for reconsideration, which the NCUC denied.

***3** dPi next filed a complaint in district court seeking declaratory and injunctive relief from the NCUC's order denying its claims. The court stressed the binding legal effect of the parties' ICA and concluded that there was substantial evidence supporting the NCUC's interpretation of the ICA, given Ms. Tipton's testimony and the clear terms of the ICA. The district court granted BellSouth and NCUC's motions for summary judgment, and dPi appealed to our Court.

Then, dPi motioned the NCUC to reconsider once more in light of new evidence about Ms. Tipton's credibility and data about BellSouth's use of waivers in Florida. The NCUC denied the motion, finding that dPi's arguments were "mere conjecture" and that the "record is insufficient to prove by the greater weight of the evidence that BellSouth granted *any,* let alone a significant amount of, LCCW promotion waivers to the customers in question or to prove that ... Tipton provided evidence 'now known to be false.' " Next, dPi filed a motion pursuant to Fed.R.Civ.P. 60(b) before the district court, and meanwhile our Court held dPi's original appeal in abeyance. The district court denied that motion, "[i]n light of the NCUC's findings and the requirements of Rule 60(b) .... " dPi again appealed to our Court, and we consolidated its two appeals.

II.

[1] While we review de novo the NCUC's interpretation of the Act, we do not "sit as a super public utilities commission," and are "not free to substitute [our] judgment for the agency's...." *GTE South, Inc., v. Morrison,* 199 F.3d 733, 745-46 (4th Cir.1999) (citations omitted). Instead, we "must uphold a decision that has substantial support in the record as a whole even if [we] might have decided differently as an original matter." *Id.* at 756 (citation omitted).

There is substantial support for the NCUC's dismissal of dPi's complaint: The ICA states that "promotions will be made available only to End Users who would have qualified for the promotion had it been provided by BellSouth directly." The NCUC heard unrebutted testimony that BellSouth's own end users would not have been entitled to the sorts of promotions for which dPi applied. Specifically, Ms. Tipton testified that BellSouth did not count 'blocks' as features, since "[i]t really doesn't make any sense for BellSouth to develop a promotion to entice customers to buy additional service when the enticement only applies to something that's already free."

While Ms. Tipton's testimony went unrebutted before the NCUC, dPi now seeks to undermine BellSouth's interpretation by attacking Ms. Tipton's testimony as lacking "personal knowledge of the situation." While Ms. Tipton stated that her testimony was based in "part" on what colleagues had told her, she also said she had reviewed all twenty-four months of promotion credit claims, and "undertaken [her] own evaluation." Ms. Tipton also added that she was "very familiar with" BellSouth's discount policy "prior to learning dPi's filing of any complaints." She remarked, "[t]hat's not something I had to learn." That is sufficient for the NCUC to admit Ms. Tipton's testimony and for us to consider it now.

*4 Next, dPi marshals various pieces of data to try to show BellSouth engaged in a practice of offering promotional discounts to other customers who purchased basic service and asked BellSouth to 'block' features. The NCUC duly considered Ms. Tipton's testimony that the data did not and could not explain the specific reasons why BellSouth had given waivers to individual customers in other regions. The NCUC also noted that "dPi, by its own admission, has done nothing more than review the data and compile a set of numbers .... [or] attempt to find even one order in which the LCCW waiver was granted to a customer that it contends was not eligible to receive the promotion and [BellSouth] contends is not." We cannot discern more meaningful inferences from this data, let alone substantial support for overturning the NCUC.

Finally, dPi argues that it qualified for the LCCW under the terms of the promotion itself. While the NCUC did not reach this issue, the face of the promotion and Tariff bolster the NCUC's decision. The LCCW refers to customers who purchase "two (2) custom calling (or TouchStar service) local features," and the Tariff explicitly defines TouchStar service to include twelve features. Nowhere does this definition refer to an ILEC's decision to 'block' certain charge-per-use features. Nor are we swayed by dPi's contentions that 'blocks' constitute features, even though they are free, because they have USOCs. The promotion refers to "purchase[d]" features-not the costless deactivation of charge-per-use features. Moreover, there are thousands of USOCs for BellSouth's functionalities, so merely having a USOC does not alone make something a 'feature.' The Tariff's passing reference to BCR and BCD as "features" in a footnote does not change matters, since that same sentence goes on to say 'blocks' "should not be included in the determination of applicable Multi-Feature Discount Plan [ ] discounts...."

III.

[2] Last, there is the question of whether the district court erred in denying dPi's Rule 60(b) motion. In that motion, dPi argued that it was entitled to relief from the earlier grant of summary judgment because new evidence allegedly showed that BellSouth had awarded LCCW credit to customers who placed orders identical to dPi's. The district court denied this motion on April 16, 2009, concluding that dPi "failed to meet the threshold requirement of asserting a meritorious claim." Even assuming dPi had met that burden, the court found that the new evidence would

not likely have led to a different outcome on the merits.

This Court reviews a district court's denial of a Rule 60(b) motion for abuse of discretion. *Aikens v. Ingram,* 612 F.3d 285, 290 (4th Cir.2010). Here, however, we need not conduct that analysis because dPi has abandoned its Rule 60(b) claim. dPi mentions the Rule 60(b) issue only once in its opening brief, in its statement of facts, *see* Appellant's Br. 21, and does not raise the issue at all in its reply brief. At no point does dPi offer any argument as to why the district court erred in denying its Rule 60(b) motion. Under Fourth Circuit precedent, dPi's failure to argue the issue amounts to a waiver. *See Edwards v. City of Goldsboro,* 178 F.3d 231, 241 n. 6 (4th Cir.1999) ("Failure to comply with the specific dictates of [Fed. R.App. P. 28(a)(9)(A)] with respect to a particular claim triggers abandonment of that claim on appeal").

IV.

***5** Accordingly, we affirm the district court's grant of summary judgment in favor of the NCUC and BellSouth.

AFFIRMED

C.A.4 (N.C.),2011.
DPI Teleconnect LLC v. Owens
Slip Copy, 2011 WL 327071 (C.A.4 (N.C.))

END OF DOCUMENT

ATTACHMENT B

NORTH CAROLINA UTILITIES COMMISSION

NOTICE TO PARTIES

Docket No. P-55, Sub 1744 Exceptions Due on or Before May 24, 2010

Parties to the above proceeding may file exceptions to the report and Recommended Order hereto attached on or before the day above shown as provided in G.S. 62-78. Exceptions, if any, must be filed (original and thirty (30) copies) with the North Carolina Utilities Commission, Raleigh, North Carolina, and a copy thereof mailed or delivered to each party of record, or to the attorney for such party, as shown by appearances noted. Each exception must be numbered and clearly and specifically stated in one paragraph without argument. The grounds for each exception must be stated in one or more paragraphs, immediately following the statement of the exception, and may include any argument, explanation, or citations the party filing same desires to make. In the event exceptions are filed, as herein provided, a time will be fixed for oral argument before the Commission upon the exceptions so filed, and due notice given to all parties of the time so fixed; provided, oral argument will be deemed waived unless written request is made therefore at the time exceptions are filed. If exceptions are not filed, as herein provided, the attached report and recommended decision will become effective and final on May 25, 2010 unless the Commission, upon its own initiative, with notice to parties of record modifies or changes said Order or decision or postpones the effective date thereof.

The report and Recommended Order attached shall be construed as tentative only until the same becomes final in the manner hereinabove set out.

EXHIBIT

F

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1744

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of dPi Teleconnect, LLC, Complainant v. BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina, Respondent	))))))))	RECOMMENDED ORDER

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina on Thursday, November 12, 2009, at 10:00 a.m.

BEFORE: Commissioner William T. Culpepper, III, Presiding, Chairman Edward S. Finley, Jr., and Commissioner Bryan E. Beatty

APPEARANCES:

For dPi Teleconnect, LLC:

Ralph McDonald, Bailey & Dixon, L.L.P., Post Office Box 1351, Raleigh, North Carolina 27602-1351

Christopher Malish, Foster, Malish & Blair, PLLC, 1403 West Sixth Street, Austin, Texas 78703

For BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina:

Edward L. Rankin, III, Post Office Box 30188, Charlotte, North Carolina 28230

Patrick W. Turner, 1600 Williams Street, Suite 5200, Columbia, South Carolina 29201

For the Using and Consuming Public:

Lucy E. Edmondson, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On April 11, 2008, dPi Teleconnect, LLC (dPi or Complainant) filed a complaint against BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina (AT&T or Respondent)[1] seeking to recover cashback promotional credits allegedly owed pursuant to the parties' interconnection agreements. On May 2, 2008, Respondent filed its answer in which it denies that Complainant is entitled to the promotional credits sought in the complaint. On May 23, 2008, Complainant filed a response indicating that Respondent's answer is not satisfactory and requesting an evidentiary hearing.

On September 10, 2008, the Commission issued an Order Scheduling Docket for Hearing and Prefiling of Testimony. Pursuant to this Order, this docket was originally scheduled for hearing on December 9, 2008.

On November 5, 2008, Respondent prefiled the direct testimony and exhibits of Nicole Bracy, Kristy Seagle, and P.L. (Scot) Ferguson. On this same date Complainant prefiled the direct testimony and exhibits of Brian Bolinger.

On November 12, 2008, Respondent filed its Motion to Compel and Motion to Suspend Procedural Schedule. On November 19, 2008, Complainant filed its Response to Respondent's Motion to Compel and the rebuttal testimony of Brian Bolinger. On November 20, 2008, Respondent filed the rebuttal testimony of Nicole Bracy and P.L. (Scot) Ferguson.

On November 21, 2008, the Commission issued its Order Canceling Hearing, Suspending Procedural Schedule, and Ruling on Data Requests. Pursuant to this Order, the procedural schedule that had previously been set in this docket was suspended pending further Order and Complainant was directed to answer certain discovery requests previously made upon it by Respondent.

On August 27, 2009, the Commission issued its Order Scheduling Hearing. By separate Order issued October 28, 2009, the starting time for the hearing was changed to 10:00 a.m.

On November 6, 2009, Respondent filed a Motion to Compel requesting the Commission to enter an Order compelling Complainant to respond to certain

[1] The Commission takes judicial notice that the merger of AT&T Inc. and BellSouth Corporation became effective on December 29, 2006. Generally, within this Order, AT&T Inc. will be designated as "pre-merger AT&T," BellSouth Corporation and BellSouth Telecommunications, Inc. prior to the merger will be designated as "BellSouth", and the post-merger entity BellSouth Telecommunications, Inc. d/b/a/ AT&T North Carolina will be designated as "AT&T".

interrogatories. On November 12, 2009, Complainant filed a Response to this Motion to Compel.

An evidentiary hearing was held on November 12, 2009 in Raleigh. Tom O'Roark adopted the prefiled direct and rebuttal testimony and exhibits of Brian Bolinger. For AT&T, Kristy Seagle presented direct testimony and exhibits, and Nicole Bracy and P.L. (Scot) Ferguson presented direct and rebuttal testimony and exhibits.

On December 7, 2009, AT&T filed a Reply to Complainant's Response to the Motion to Compel. On December 15, 2009, the Commission entered an Order Requiring Answers to Interrogatories.

On January 5, 2010, the Commission issued an Order Requesting Proposed Orders. On February 3, 2010, the Public Staff requested an extension of the deadline for proposed orders, and the Commission granted such request on the same date.

On February 19, 2010, dPi, AT&T and the Public Staff, respectively, filed Proposed Orders and/or Post-hearing Briefs.

On March 15, 2010, dPi filed a Motion for Leave to File Reply Comments. In its Motion, dPi requested that the Commission allow dPi to comment further on issues that were raised but not fully addressed during the hearing, i.e., the billing dispute limitation period, the application of the wholesale discount to promotional amounts and verification of amounts in dispute. On April 1, 2010, AT&T responded to dPi's Motion by filing its Reply in Opposition to dPi's Motion. By Order dated April 9, 2010, the Commission granted dPi's Motion to File Reply Comments.

On March 23, 2010, Affordable Phone Services, Inc., and LBC Management, LLC d/b/a Angles Communications Solution (Amici) filed a Motion for Leave to File Amicus Curiae Brief. On April 1, 2010, AT&T responded to the Amici's Motion by filing its Reply in Opposition. The Commission Denied Amici's Motion on April 9, 2010.

Based on the foregoing, the evidence presented at the hearing, and the entire record in this matter, the Commission now makes the following

FINDINGS OF FACT

1. AT&T is duly certified as an incumbent local exchange carrier (ILEC) providing retail and wholesale telecommunications service in its North Carolina service area. Pursuant to federal law, AT&T has a duty to offer any telecommunications service that it offers to its retail customers to competing local providers (CLPs) at wholesale rates. 47 USC 251(c)(4). Pursuant to this obligation, AT&T permits CLPs to resell discount promotional plans that AT&T offers to its retail customers.

2. dPi is duly certified as a CLP and purchases telephone service from AT&T for resale to its end user customers in North Carolina on a prepaid basis.

3. During the period from late-2003 through July 2007, BellSouth and then post-merger, AT&T, offered three cashback promotions under which an end user who subscribed to a particular service or bundle of services for a particular term would apply to the ILEC for a coupon which could be redeemed for cash.

4. BellSouth did not make these cashback promotions available to CLPs for resale through mid-June of 2007. Pre-merger AT&T allowed CLPs to resell such cashback promotions. In July 2007, AT&T standardized the conflicting practices of BellSouth and pre-merger AT&T and adopted pre-merger AT&T's policy of allowing CLPs to resell cashback promotions.

5. During the period at issue in the complaint, two interconnection agreements between the parties were in effect, the first effective April 19, 2003 (ICA1), and the second effective May 12, 2007 (ICA2).

6. Section 2.1 of Attachment 7 to ICA1 required each party to notify the other party in writing upon the discovery of a billing dispute. dPi was required to report all billing disputes to BellSouth using a specified form provided by BellSouth. If a billing dispute arose, the parties agreed to try to resolve such dispute in 60 days, after which they could pursue dispute resolution under other provisions of ICA1.

7. Section 2.2 of Attachment 7 to ICA1 defined a "billing dispute" as a reported dispute of a specific amount of money actually billed by either party. The dispute was required to be clearly explained by the disputing party and supported by written documentation.

8. Although ICA1 does not specify a time in which a party must discover and notify the other of a billing dispute, Section 18 of its Terms and Conditions specifies that the Agreement will be governed by federal and state substantive telecommunications law, but in all other respects the "Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles."

9. In Georgia, the limitations period for a breach of contract is six years. O.C.G.A. 9-3-24.

10. In August 2004, AT&T witness Seagle, then a BellSouth employee, met with a representative for Lost Key Telecom, Inc. (Lost Key), which acted in an agency capacity for dPi. Witness Seagle informed the Lost Key representative that BellSouth did not make available for resale cashback promotional offers.

11. On July 21, 2005, dPi submitted a request for promotional credits for a cashback promotion. On August 2, 2005, witness Seagle informed the dPi representative that the cashback promotion was not available for resale.

12. dPi first disputed AT&T's denial of the requested credits in January 2007.

13. The table attached as Appendix A sets out the various claims at issue in this complaint and the pertinent dates and periods relating to such claims. [2]

14. ICA2 became effective on May 12, 2007.

15. Section 30.1 of the General Terms and Conditions (GTC) of ICA2 indicates that ICA2 supersedes ICA1 and that any orders placed under ICA1 will be governed by the terms of ICA2. In ICA2, dPi acknowledges and agrees that all amounts and obligations owed for services provisioned or orders placed under ICA1 shall, as of May 12, 2007, be due and owing under ICA2 and be governed by ICA2's terms and conditions as if such services or orders were provisioned or placed under ICA2.

16. Pursuant to Section 2.1 of Attachment 7 of ICA2, after a denial of a billing dispute or the passage of 60 days after submission of a billing dispute to AT&T, dPi is required to pursue a specific escalation process or the billing dispute is considered denied and closed. Only after completion of the escalation process is dPi permitted to invoke the dispute resolution process provided under the General Terms and Conditions.

17. Section 2.1 of Attachment 7 of ICA2 also provides that dPi agrees not to submit billing disputes for amounts billed more than twelve months prior to submission of a billing dispute filed for amounts billed.

18. BellSouth and post-merger AT&T were aware that dPi disputed AT&T's denial of its claim for promotional credits within 60 days of the effective date of ICA2.

19. On May 12, 2007, the effective date of ICA2, AT&T's official position was that the cashback promotion was not available for resale. Consistent with this policy, AT&T denied dPi's cashback requests associated with service orders submitted from September 2003 to June 2007.

20. AT&T changed its position and made the cashback promotion available for resale prospectively in July 2007.

21. All claims were pending and subject to dispute on the date that ICA2 became effective and on the date when the Complaint in this proceeding was filed.

22. All claims were disputed within the 12 month limitation period established in ICA2.

[2] For identification purposes, the Commission will refer to a particular Claim No. by the row on which it appears as set out in Appendix A. Thus, Claim No. C2-NC-704-20031108 will be referred to in this Order as Claim 1.

23. dPi has reasonably complied with the terms of Sections 2.1 and 2.2 of Attachment 7 of ICA2 in regard to each claim, and AT&T's contention that these sections of ICA2 bar these claims is without justification.

24. AT&T has not shown that its and BellSouth's refusal to allow resale of the cashback promotions in question was reasonable and nondiscriminatory.

25. dPi's claims for these amounts are not barred by the equitable doctrine of laches.

26. AT&T should calculate the value of the promotional discount by deducting the wholesale discount from the retail value of the promotion.

27. Subject to validation as provided by this Order, dPi is entitled to receive credit for claims submitted minus the wholesale discount.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT Nos. 1 AND 2

These findings of fact are essentially informational, procedural, and jurisdictional in nature, and the matters which they involve are uncontroversial. They are supported by information contained in the parties' pleadings and testimony and the Commission files and records regarding this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 3

This finding of fact is supported by the pleadings and the testimony of dPi witness O'Roark and AT&T witness Ferguson. It also appears that the finding of fact is essentially informational in nature and uncontroverted by the parties.

According to AT&T witness Ferguson, BellSouth or AT&T, as applicable, offered three promotions under which dPi claims it should have received credits: $100 Cashback for IFR + 2 Custom Calling or TouchStar Features; $100 Cashback for Complete Choice, Area Plus with Complete Choice and Preferred Pack; and $50 Cashback 2-Pack Bundle Plan. The $100 Cashback for IFR + 2 Custom Calling or TouchStar Features promotion was available from August 25, 2003 to January 31, 2005 to new residential subscribers to AT&T's local service who purchased basic residential service plus at least two qualifying Custom Calling or TouchStar features. When an end user qualified for this promotion, AT&T would mail a $100 Cashback coupon. The end user had to redeem the coupon within 90 days of receipt to receive a $100 check.

The $100 Cashback for Complete Choice, Area Plus with Complete Choice and Preferred Pack promotion was available to qualifying AT&T end users from June 1, 2003, and continued through the period involved in the complaint. The promotion was available to returning AT&T end users not currently subscribed to AT&T's local service for at least ten days prior to their service request. In addition, the end user qualified for the promotion by purchasing AT&T's Complete Choice, Area Plus with Complete Choice, or Preferred Pack Plan service offerings. When an end user qualified for this promotion, AT&T would mail a coupon for $100 Cashback. The end user had to mail in the completed coupon, along with the first month's bill showing the purchase of eligible services, to receive a check for $100.

The $50 Cashback 2-Pack Bundle Plan promotion was available from December 15, 2005 to April 30, 2007. On May 1, 2007, and continuing through the period involved in this Complaint, the cashback reward was reduced to $25. The promotion was offered to reacquisition end users who purchased AT&T's 2-Pack service offering with an affiliate service such as long-distance, DirecTV, DSL, or wireless service. Customers received a cashback coupon and optional voicemail service. When an end user qualified for this promotion, AT&T mailed the customer a coupon that the customer would redeem to receive a $50 check, or after April 30, 2007, a $25 check.

The description of the promotions in question in this matter by AT&T witness Ferguson was uncontroverted by dPi.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 4

This finding of fact is supported by the pleadings, the testimony of dPi witness O'Roark, the testimony of AT&T witness Seagle and her Exhibit KAS-1, and the testimony of AT&T witnesses Bracy and Ferguson.

As AT&T witness Ferguson explained, BellSouth's policy was that 47 USC 251(c)(4) did not require the cashback portion of a promotion to be made available for resale, but only the telecommunications service associated with such promotion. As of July 2007, AT&T began making available the cashback portion of a promotion to CLPs, whose end users met the eligibility requirements, which was the policy of the pre-merger AT&T and post-merger AT&T except in the former BellSouth region. According to witness Ferguson, this reversal in policy was not coincidental with the issuance of the Fourth Circuit Court of Appeals' decision in *BellSouth Telecom, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007), where BellSouth failed to prevail in its appeal of two decisions of this Commission regarding promotions. Instead, witness Ferguson testified that the change in policy was based on a business decision to standardize post-merger AT&T's policies on the issue across its 22-state region.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT Nos. 5, 6, 7 AND 8

These findings of fact are based on portions of the parties' interconnection agreements contained in Exhibits PLF-1 and PLF-2 and attached to the testimony of AT&T witness Ferguson. They are informational in nature.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 9

This finding of fact is supported by the stipulation of counsel and Georgia state law, O.C.G.A. 9-3-24.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 10

This finding of fact is supported by the testimony of dPi witness O'Roark and the testimony and Exhibit of AT&T witness Seagle.

The record indicates that BellSouth informed dPi of its policy that cashback promotions were not available for resale in August 2004. According to AT&T witness Seagle, she met with a representative from Lost Key, dPi's billing and collections agent for promotional credits and in the course of the conversation informed him of the company's position on resale of such promotions. She then followed up her conversation by restating this policy in an August 26, 2004 e-mail contained in Exhibit KAS-1. At the hearing, dPi stipulated that BellSouth specifically told Lost Key that cashback promotions were not available for resale in the August 2004 time frame. Thus, it is clear that BellSouth had given dPi notice of its policy regarding resale of promotions as of August 26, 2004.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 11

This finding of fact is supported by the testimony and exhibits of AT&T witness Seagle.

AT&T witness Seagle testified that on July 21, 2005, the Lost Key representative submitted a request on behalf of dPi for promotional credits for a cashback promotion. On August 2, 2005, witness Seagle responded that the cashback promotion was not available for resale. The representative of Lost Key then acknowledged witness Seagle's response.[3] Witness Seagle's testimony was not controverted. AT&T has shown that it again made dPi aware of its policy regarding resale of cashback promotions in August 2005.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 12

This finding of fact is based on information stipulated to by the Complainant.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 13

This finding of fact is supported by information contained in Exhibit NWB-1, attached to the testimony of AT&T witness Bracy. This information was uncontroverted by any party.

[3] These claims denied on August 2, 2005 do not appear to be part of the claims included in the complaint as Complainant stipulated that Lost Key did not submit any requests for promotional credits to AT&T on behalf of dPi until December of 2005.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT Nos. 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 AND 25

These findings of fact are based on the evidence, the transcripts and exhibits and the record proper.

Beginning in 2004, dPi began to make inquiry to BellSouth about the availability of BellSouth's cashback promotion resale. First, in August 2004 and again in August 2005, BellSouth informed dPi that the cashback promotions at issue in this proceeding were not available for resale. dPi continued to submit written requests to BellSouth to be given credit for the cashback promotions. *See* dPi Exhibit I. BellSouth failed to accept or deny dPi's repeated requests for credits. This conduct persisted until July 2007 when post-merger AT&T decided to honor appropriate requests that dPi made for cashback promotion resale credit for orders that were submitted from June 2007 forward. AT&T, however, denied any requests made by dPi for cashback promotion resale credits for orders that were submitted prior to June 2007. dPi filed this Complaint alleging that AT&T violated federal law and the explicit terms of their interconnection agreements in refusing to provide the benefits of these cashback promotions to dPi for orders that originated prior to the July 2007 policy change.

In its answer and defense, AT&T now contends that BellSouth/AT&T was not and is not required by federal law or FCC regulations to offer these particular cashback promotions to dPi for resale because these restricted offerings are reasonable, nondiscriminatory and, thus, not harmful to competition. In the alternative, AT&T contends that dPi is not entitled to the credits that it now seeks because dPi did not dispute and/or escalate in a timely manner as required by its interconnection agreement and is therefore barred from any recovery or, to the extent that dPi did dispute and/or escalate these disputes in a timely manner, the amounts that dPi seeks must be reduced by the applicable residential resale and error rate discounts.

Ordinarily, when resolving complaint proceedings, this Commission would first resolve the issues raised by the Complainant since the Complainant has alleged injury and has the burden of proof. However, in this instance, the Commission, in its discretion, will first resolve AT&T's contention that dPi is not entitled to such pre-policy change credits because, as a matter of federal law, these restricted offerings are reasonable, non-discriminatory and, thus, not harmful to competition. We choose to resolve this issue first because a determination that the cashback offerings are reasonable, nondiscriminatory and, thus, not harmful to competition would obviate the need to inquire further into this case to determine if both parties have complied with contractual obligations which, when applicable, would determine whether dPi is entitled to credits.

At the outset, the Commission notes, as did AT&T, that the federal Act does not absolutely prohibit restrictions on resale. Instead, it imposes on ILECs a duty "not to prohibit, and not to impose *unreasonable or discriminatory* conditions or limitations on, the resale of such telecommunications service . . . ." 47 U.S.C. 251(c)(4)(B) (emphasis added). In light of this statutory language, the FCC established a presumption that restrictions on resale that are not expressly permitted in its *Local Competition Order* are unreasonable and discriminatory, but it expressly provided that ILECs "can rebut this presumption, but only if the restrictions are narrowly tailored." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶939 (1996)(*Local Competition Order*). In its rules, the FCC further explained that "an incumbent LEC may impose a restriction" on resale if it "proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 CFR 51.613(b).

Consistent with FCC policy, this Commission stated on December 22, 2004 in Docket No. P-100, Sub 72(b), *(Restriction on Resale Order I)*, a decision interpreting federal law and regulations, that the "benefit of a ...promotion offered for more than 90 days must be made available to resellers such that resellers are permitted to purchase the regulated service(s) associated with the promotion at the promotional rate minus the wholesale discount, unless the ILEC proves to the Commission (per 47 C.F.R. 51.613(b)) that not applying the wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation." In that same Order, the Commission refused to establish a bright line rule that promotions that exceed 90 days in length must be offered to resellers in addition to the reseller discount in favor of an approach where the ILEC may, on a case-by-case basis, prove that a promotion that is offered for more than 90 days may not be subject to mandatory resale at the additional discounted rate because the restricted offering is reasonable, nondiscriminatory and thus, not harmful to competition. The Commission ruling in this regard was clarified further in our subsequent Order of June 3, 2005 (*Restriction on Resale Order II)* in the same docket and affirmed in *BellSouth v. Sanford et al*, 494 F.3d 439(4^{th} Cir., 2007).

During the hearing, dPi argued that FCC regulations require AT&T to obtain a state Commission ruling that its proposed restriction of the resale of these promotions is reasonable and nondiscriminatory before imposing such restrictions on promotions resale that are offered for more than 90 days. The Commission disagrees.

While an ILEC may voluntarily seek pre-approval for promotions containing restrictions on resale that are intended to last more than 90 days, it is not mandated to apply for and receive prior Commission approval before implementing such restrictions. Imposing a mandated pre-approval process would unnecessarily burden the Commission's resources because it would have to convene a proceeding to address *all* such offerings instead of only addressing those to which affected parties actually object. Moreover, such a requirement would also have a chilling effect on the competitive offerings available to consumers, because ILECs would be reluctant to provide their wireline, wireless, cable, and VoIP competitors so much advanced notice of their upcoming offerings.

Given that, the Commission concludes that the post-implementation approval process being employed is permissible and is in accord with our prior orders interpreting

FCC regulations.[4] Under this process, an ILEC may restrict resale of these presumptively unreasonable and discriminatory promotions that are offered in excess of 90 days without securing pre-approval from this Commission to do so. If challenged, however, the ILEC must rebut this presumption and "prov[e] to the state commission that the restrictions on resale are reasonable and nondiscriminatory. *BellSouth v. Sanford et al*, 494 F.3d 439, 453 (4th Cir., 2007). If the ILEC does not produce sufficient evidence to overcome the burden, the Commission must, because of the presumption, find that the restrictions on resale are unreasonable and discriminatory and, when appropriate, retroactively provide the party the benefit to which it was entitled but for the unreasonable and discriminatory restriction placed on the resale of the promotion by the ILEC. This is consistent with the North Carolina courts' treatment of presumptions in other contexts.

In the *Restriction on Resale Orders*, the Commission stated that we would consider such key factors as the length of the promotion and resellers' interest in the promotion to determine if the proposed/implemented restrictions were reasonable and nondiscriminatory.[5] Further, in those same Orders, we stated that the listing of key factors was not exhaustive nor dispositive; and, that while promotions that exceed 90 days must be analyzed individually for their anticompetitive effects, "ILECs should be mindful that resale restrictions on unreasonably long, unlimited or permanent promotions that compete with and undercut the tariffed retail price for service would gut the resale obligation of TA96 and will be held unreasonable." *Restriction on Resale Order I*, p. 13. The Commission now examines the cashback promotions with these and other factors in mind.

With regard to the first factor, i.e., the length of the promotion, the Commission finds that the two shortest promotions lasted approximately 16 months and the longest lasted approximately 48 months.[6] The length of those promotions far exceeded the threshold that the FCC presumed to be unreasonable and discriminatory by a minimum order of magnitude of 4 and a maximum of 16. Further, these periods were considerably longer than the nine month promotional period that the Commission, in dicta, indicated

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[4] See also fn 12 in the *Restriction on Resale Order I*. In that footnote the Commission allowed ILECs to implement gift card promotions associated with mixed bundled offerings of regulated and non-regulated services on one day notice without running afoul of the ILECs' right to offer the promotion without obtaining the Commission's approval. In that instance, the Commission noted that, similar to this case, the issue was not so much the approval of the promotion, but rather, determining what the discounted rate should be after the promotion has been placed into effect.

[5] The Commission later clarified that: "The Commission's discussion of factors that an ILEC may present to establish that a restriction is reasonable and nondiscriminatory was not intended to be exhaustive nor meant to suggest that the presence of any one or all of the factors would be sufficient to prove that a given restriction is permissible under FCC rules. Rather, the Commission's opinion stressed that each 90-day-plus promotion, including 1FR + 2 Cash Back promotion, would have to be examined on a promotion-by-promotion basis, and that, in the absence of an objection by a reseller, the stated factors could be considered and could have some persuasive value to the Commission in determining whether a particular restriction on resale is reasonable and nondiscriminatory." *Restriction on Resale Order II*, p. 3.

[6] There is no evidence in the record to suggest that the latter promotion has been discontinued.

that it might find reasonable and non-discriminatory based upon the facts of that particular proceeding.

The length of these promotions are of particular concern to the Commission because, as we noted in the *Restriction on Resale Order I*, on pp. 10-11, "[i]f a promotion is offered for an indefinite extended period of time, at some point it starts to become or look more like a standard retail offering that should be subject to resell at the wholesale rate." Were it not for TA96 and the FCC regulations, the Commission would be hard-pressed not to conclude based on these facts alone that these "resale restrictions [are]...unreasonably long, unlimited [and]...permanent promotions that compete with and undercut the tariffed retail price for service [that] would gut the resale obligation of TA96 and [are, therefore] unreasonable." *Restriction on Resale Order I*, p. 13. The Commission has not succumbed to this temptation. Instead, as we are required to do, we have considered this evidence in conjunction with all other evidence in making the determination required by TA96 and FCC regulations.

With regard to the second key factor, i.e., resellers' interest in the promotion, the evidence is clear that within nine months after dPi began purchasing the telecommunications services that were subject to the retail promotions at issue, and within one month of dPi's hiring of an outside agent to identify and submit promotional credits that dPi was entitled to receive, dPi expressed interest in reselling the promotion. To date, no other reseller, however, has expressed an interest in reselling the promotion. AT&T witness Ferguson contends that since dPi is the only reseller that has brought this matter before the Commission, this indicates disinterest in the promotion by resellers. While the Commission agrees that this fact supports an inference that some resellers are not interested in this promotion, the Commission is reluctant in the current economic climate to conclude that CLPs generally are disinterested in reselling the cashback promotion. Rather, the Commission views this "disinterest" as recognition by CLPs that these promotions would not be made available by BellSouth without CLPs incurring the expense involved in a legal proceeding.[7]

AT&T also attempted to show that its refusal to pay the credits for the cashback promotion did not have an anti-competitive effect based on dPi's number of customers in North Carolina. Witness O'Roark testified that while BellSouth or AT&T was not paying the cashback credits, dPi's number of customers in North Carolina increased, but when AT&T began paying such credits, dPi's number of North Carolina customers declined. Mr. O'Roark explained on redirect that the customer numbers declined substantially due to a program offered by MCI and then rose after dPi acquired another company. AT&T has not demonstrated any causal relationship between its payment of promotional credits and dPi's customer losses. Nor is the Commission convinced that there is a relationship between dPi's number of customers in North Carolina and the change in policy on the payment for resale of cashback promotions.

[7] As highlighted by this proceeding, BellSouth has consistently maintained the position that promotions were not available for resale to CLPs in proceedings before this Commission and federal courts prior to the prospective policy change in July 2007 which harmonized BellSouth's promotion resale policy with that of post-merger AT&T.

AT&T contends that it would be discriminatory against other CLPs if it paid dPi for the cashback promotions in question. dPi, however, argues that this claim is illogical. The Commission agrees with dPi. First, there is no evidence that any other CLPs in North Carolina are seeking such credits. Finally, if AT&T's denial of such credit is unreasonable in this matter, it would be unreasonable to deny another CLP's claim that was otherwise valid as well.

AT&T also argues that these restrictions on resale do not stifle competition between dPi and AT&T because dPi does not compete directly with AT&T for the same customer. To support its contention, AT&T cites testimony that dPi witness O'Roark gave in a proceeding in Georgia in which he stated that "essentially every one of dPi's new customers is someone who was formerly a customer of BellSouth or another provider and who left after getting into trouble over their phone bill." AT&T Post Hearing Brief, p. 2. In this proceeding, however, when asked if it was fair and accurate to say that "essentially every single one of dPi's new customers is someone who was formerly a customer of AT&T or another provider and who left after getting into trouble over their phone bill," dPi witness O'Roark would only state that the statement "would be true about a large percentage of our customers", "not 100 percent." (Tr. p. 84) Thus, contrary, to AT&T's assertion, dPi and AT&T do compete directly for the same customers in a small percentage of cases. In those cases, limited though they may be, AT&T's restriction on resale provides it with a significant advantage over dPi and stifles competition. [8]

Moreover, even if the Commission assumes that AT&T and dPi do not directly compete for the same customers, we simply are not persuaded that dPi's decision to pursue credit-challenged customers overcomes the presumption that these restrictions on resale are unreasonable, discriminatory and harmful to competition. TA96 encouraged CLPs to distinguish themselves from ILECs by offering consumers different options than those provided by ILECs in the hope that overall competition would be increased. To do so, Congress encouraged and permitted CLPs to exploit these distinctions by mandating that the ILECs provide CLPs with access to the ILEC's network and that the ILEC permit CLPs to resale ILEC services on a reduced basis. Within this framework, dPi identified and exploited a market niche that was not being served by BellSouth. Thus, it is antithetical to suggest that a CLP that distinguished itself in a way that is encouraged by TA96 is not competitively stifled by an ILEC's refusal to resale a promotion that will allow the CLP to be a more financially viable competitor.

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[8] The Commission takes judicial notice that, as of August 28, 2009, there were 185 certified CLPs in North Carolina. *Report of the North Carolina Utilities Commission to the Joint Legislative Utility Review Committee*. p. 7. While we have no way of knowing with any certainty, it is reasonable to presume that one or more of these CLPs would compete with or would like to compete with AT&T for the same core customers that AT&T has identified as its customer of choice. In those instances, AT&T's long-term restricted resale policy discourages rather than encourages entry into the market by conferring an unfair advantage upon AT&T over any CLP that chooses to or might choose to compete directly against AT&T but *cannot* offer a similar cashback bonus. As a result, competition is stifled and these core customers are left with fewer choices for telecommunications services.

Similarly, we are not persuaded that dPi's decision to retain the proceeds of the promotion rather than pass those proceeds directly to the customer overcomes the presumption that these restrictions on resale are unreasonable, discriminatory and harmful to competition. As we noted in *Restriction on Resale Order II*, p. 7, " [t]he resale obligation of TA96 permits a CLP to use the wholesale discount in a way that is beneficial to it without requiring the benefit to be passed directly to the end user..." As we stated before, this was done in the hope that overall competition would be increased and, in our view, it would be antithetical to suggest that dPi is not competitively stifled by AT&T's refusal to provide dPi with the benefits of these long-term promotions because dPi exercised an option permitted by TA96.

Finally, the most telling evidence in the record as to the reasonableness of AT&T's refusal to offer the cashback promotion for resale is its own conduct. The Commission acknowledges AT&T witness Ferguson's explanation that AT&T changed the BellSouth policy of denying resale of these promotions to standardize its policy across its 22-state region. The fact remains, however, that this change in policy reflected a pre-merger AT&T position, a more legally defensible position under the *Sanford* decision and, as witness Ferguson conceded on cross-examination, has resulted in AT&T paying millions of dollars to resellers. Thus, it is difficult to conclude that AT&T changed the BellSouth policy solely for purposes of standardization.

AT&T has the burden of showing that its denial of the resale of the cashback promotion was reasonable and nondiscriminatory. After fully considering the aforementioned arguments, the evidence, the transcript of this proceeding and the record proper, the Commission finds that AT&T has failed to meet its burden of proving that the restrictions that it placed on the resale of the cashback promotions were narrowly tailored, reasonable, nondiscriminatory and, thus, not harmful to competition. Stated more simply, we find that AT&T's restriction on resale of the cashback promotions was unreasonable, discriminatory and harmful to competition.

Having determined that AT&T's resale restrictions were unreasonable and discriminatory, we now must determine what, if any, recompense dPi is entitled to receive because of AT&T's refusal to provide the cashback promotions in question to dPi for resale. In this phase of the determination, both parties agree that dPi, as the Complainant, has the burden of proof and that dPi's right to recompense is governed primarily by the two voluntarily negotiated ICAs.

For the most part, the parties are in agreement as to the facts surrounding this dispute. That is, the parties are in agreement as to when and by what manner dPi expressed its interest in reselling the cashback promotions. Similarly, the parties are in agreement as to when and in what manner BellSouth responded to dPi's interest. The parties' central disagreement in this proceeding is not about the facts; instead, the core disagreement between the parties is about the meaning of the terms and conditions contained in both ICAs and the applicability of the terms and conditions of ICA1 to ICA2 to the undisputed facts of this case. Thus, to resolve this dispute, we begin our analysis by examining key components of the ICAs and interpreting and applying those provisions in accordance with Georgia contract law.[9]

Although the parties acknowledge the number and the nature of the ICAs in this case, they differ markedly on the effect that the ICAs have on the issues in this proceeding. For instance, although both parties agree that the initial ICA and the second ICA contain different limitation periods for submitting and resolving billing dispute claims, they strongly disagree on which limitation period governs unresolved claims that arose during the period while ICA1 was effective. ICA1 implicitly establishes a six year limitation period in which disputes are to be identified, submitted and either resolved or a complaint proceeding initiated; whereas, in ICA2, dPi agreed "not to submit billing disputes for amounts billed more than twelve (12) months prior to the submission of a billing dispute filed for amounts billed."

AT&T argues that ICA2 bars dPi from collecting on claims that arose while ICA 1 was effective if those claims were submitted more than 12 months after they were billed; or, in the alternative, AT&T argues that dPi is barred from collecting on those same claims because dPi did not escalate or resolve those claims as required by ICA2. dPi argues that the claims were timely under either ICA1 or ICA2. The Public Staff argues that since ICA1 did not explicitly establish a period in which dPi was required to discover and notify AT&T of disputed billings, it is reasonable to infer that dPi was required to discover and notify AT&T of billing disputes within 12 months of the billing period. Because Claim numbers 1, 2, 3, 21, and 23 were not discovered and reported by dPi to AT&T within 12 months of billing, the Public Staff argues that AT&T was reasonable in denying dPi's request and dPi was barred from seeking recovery for the denial. With the exceptions of Claim Numbers 34, 35 and 36 which, as of the date of the Complaint, had not been submitted to AT&T, the Public Staff asserted that dPi was entitled to credit for those claims remaining since they had been discovered and reported to AT&T within 12 months of the billing date. As to Claim Nos. 34, 35 and 36, the Public Staff recommended that the Commission order dPi and AT&T to work together to resolve the status of those claims.

Under Georgia law, an existing contract will be replaced and discharged when the parties enter into a subsequent agreement that covers the subject matter addressed by the original contract.[10] ICA2, Section 30.1 clearly and unambiguously states that the

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[9] Pursuant to Georgia law, the construction of a contract is a question of law for the court to determine, O.C.G.A. 13-2-1 *et seq.*

[10] See, e.g., *Munson v. Strategis Asset Valuation & Mgmt.*, 363 F. Supp. 2d 1377 (N.D. Ga. 2005) (applying the doctrine of novation to find that a contract was superseded by a subsequent agreement). A novation occurs when the parties to a contract substitute a new agreement for the old one. An effective novation has four elements: (1) a previous valid obligation; (2) the agreement of all the parties to the new contract; (3) a mutual intention by the parties to substitute the new contract for the old one; and (4) a valid new contract. *Munson*, 363 F. Supp. 2d 1377, 1381-82 (holding that the parties' relationship was governed by the latter agreement, rather than the original contract because the terms of the latter agreement indicated that it was intended to supersede the original contract); see also, e.g., *Rentokil, Inc. v. Creative Plantscapes, Inc.*, 1999 U.S. App. LEXIS 31587 (4th Cir. Dec. 3, 1999) (finding

agreement "sets forth the entire understanding and supersedes prior agreements between the Parties relating to the subject matter contained in this Agreement and merges all prior discussions between them." The evidence is uncontroverted that the subject matter of both agreements is indeed the same. Thus, it is clear from the language in ICA2 and Georgia contract law that billing disputes that existed prior to the effective date of ICA2 are, to the extent possible, to be resolved in accordance with the terms and conditions mutually agreed to in ICA2 instead of the terms and conditions in ICA1.

The plain language of the 2007 interconnection agreement provides that "the rates, terms, and conditions of this Agreement shall not be applied retroactively prior to the Effective Date."[11] Further, in ICA2 dPi expressly agrees that "any orders placed under [the prior agreement]" and "any and all amounts and obligations owed for services provisioned or orders placed under [the prior agreement]" will be "due and owing" and "governed by the terms and conditions" of the 2007 interconnection agreement. dPi further unequivocally "agrees not to submit billing disputes for amounts billed more than twelve (12) months prior to submission of a billing dispute filed for amounts billed." (*Id.*, Section 2.2). Finally, dPi agreed to "pursue the escalation process as outlined in the Billing Dispute Escalation Matrix, set forth on BellSouth's Interconnection Services Web site, or the billing dispute shall be considered denied and closed." (Exhibit PLF-2, Attachment 7, Section 2.1). Because of the merger clause, these are the key provisions that dPi must comply with in order to pursue a disputed billing claim for promotional credits that arose before and after the effective date of ICA2.

AT&T contends that the evidence in this proceeding conclusively demonstrates that dPi has failed to comply with these contractual provisions and that dPi is therefore not entitled to receive any of the credits that it now seeks. In the alternative, AT&T contends that the evidence suggests that the credit amount that dPi is entitled to receive should be greatly reduced.

After carefully reviewing the evidence, the Commission finds that dPi has substantially complied with the pertinent provisions of ICA2. To reach this conclusion, we find that these disputed bills were "obligations owed for services provisioned or

sufficient evidence to show the parties' intent in a new employment agreement that included a superseding clause as to all other agreements between the parties to novate and extinguish the old agreement). Under the doctrine of contractual merger, when parties enter into a final contract, all prior negotiations, understandings, and agreements "on the same subject matter" are merged into the final contract and are accordingly extinguished. *Health Svc. Centers v. Boddy*, 257 Ga. 378, 380 (359 S.E. 2d 659) (Ga. 1987) (citing *Holmes v. Worthey*, 159 Ga. App. 262, 267, 282 S.E. 2d 919 (Ga. App. 1981).

[11] Exhibit PLF-2, General Terms and Conditions, Section 30.1.

orders placed under [the prior agreement]" which dPi, by agreement[12], was required to resolve within 12 months of the effective date of ICA2[13] or those claims would be forever extinguished.[14] Attachment 7, Section 2.2.

The evidence is uncontroverted that dPi filed this Complaint on April 11, 2008. The filing was well within the 12 month limitation period in which dPi was required to resolve these matters with AT&T through formal or informal discussions or to file a complaint proceeding if its efforts to do so failed. Moreover, prior to the complaint being filed, it is uncontroverted that dPi provided AT&T with written requests detailing each claim in dispute.[15] At the time the complaint was filed, none of the claims exceeded the six year statute of limitations that governed Georgia contract claims originating during ICA1 or the 12 month limitation period agreed to in ICA2. Further, as a result of the previously discussed submissions, AT&T was aware that dPi disputed each claim within 60 days of the "obligations [being] owed for services provisioned or orders placed under [the prior agreement]." And, finally, none of the claims identified were resolved within 60 days. Thus, each claim identified is viable and can be resolved in these proceedings.

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[12] Controlling Georgia law allows parties to contractually agree to a limitation period shorter than that provided by general statutes. *See Bullington v. Blakely Crop Hail, Inc.*, 294 Ga. App. 147, 668 S.E.2d 732, 735 (2008), *cert. denied* (2009) (Bullington contends that this action is subject to the six-year statute of limitation for actions on simple contracts in writing, set out in OCGA § 9-3-24, and, therefore, that the trial court erred in applying a one-year limitation period. We disagree. The insurance contract plainly established a one-year period of limitation. It is well established that an insurance policy provision that places a one-year limitation upon the right of the insured to sue the insurer is valid and enforceable even though it shortens the period allowed by statute.). This is consistent with North Carolina law. *See Thigpen v. East Carolina Railway*, 184 N.C. 33, 113 S.E. 562, 563 (1922) (holding consistent with "clear weight of authority" that parties could fix given time, shorter than general statute of limitations, within which suit for breach of contract must be brought).

[13] For billing disputes that arose prior to the effective date of ICA2, we expressly reject AT&T's suggestion that the expiration of the limitation or escalation period is determined by reference to the date that the original order was placed under the ICA1, the prior interconnection agreement. The Commission believes that to impose a retroactive requirement that dPi escalate and resolve these claims when the period for such escalation and resolution had long expired would place an impossible condition on dPi and would lead to an absurd result. Moreover, imposition of such a suggestion is inconsistent with Section 2.1 that states that "the rates, terms, and conditions of this Agreement shall not be applied retroactively prior to the Effective Date. ICA2 can only be given prospective effect if the submission date is viewed as being the effective date of the contract.

[14] We also reject the Public Staff's contention that dPi was required to discover and notify AT&T of billing disputes within 12 months of the bill being provided while ICA1 was in effect. Based upon this reading, the Public Staff essentially extinguished a number of claims that arose during ICA1 that dPi submitted which were not submitted within the 12 months. There is no evidence in the record that either party believed that dPi's failure to discover and notify AT&T within 12 months extinguished the claim during the period in which their relations were governed by ICA1. Quite the contrary, the evidence is that the claims submitted by dPi during that period that were more than "12 months old" were denied, to the extent that they were denied, solely because the promotion was not available for resale.

[15] See dPi Exhibit 1 and NWB-1 which indicates the date that dPi submitted each request for credit and the acknowledgement of receipt of the request by AT&T.

In its Brief and Proposed Order, AT&T argued that dPi failed to "pursue the escalation process as outlined in the Billing Dispute Escalation Matrix, set forth on BellSouth's Interconnection Services Web site, or the billing dispute shall be considered denied and closed." (Exhibit PLF-2, Attachment 7, Section 2.1). AT&T further argued that the failure of dPi to comply with these escalation provisions would bar dPi from pursuing these claims in this Complaint proceeding. We do not agree.

During the hearing, AT&T witness Scot Ferguson testified that to the best of his knowledge, dPi did not follow the escalation process required and defined by the 2007 interconnection agreement. We are not persuaded by this testimony. Rather, we find dPi's witness who offered testimony that Brian Bollinger, dPi's former in-house attorney, "escalated and attempted to resolve this issue" with an AT&T representative more persuasive on this point.

Even if we did not find dPi's witness persuasive on this point, dPi's failure to escalate the disputes in compliance with the exact terms of ICA2 would not bar its claims in view of its substantial compliance with the agreement in general. Furthermore, it is black letter law in contract matters that performance of an act required by contract is not necessary where such performance would be an idle, useless or futile act. *Williston on Contracts*, 4th Ed. Section 47.4. This is the law in Georgia.[16]

The uncontroverted facts of this case are that dPi has consistently submitted such claims to AT&T for credit since 2005 only to be "denied" by AT&T's inaction. Until July 2007, AT&T denied these claims because they contended that federal law and regulations did not require that these promotions be made available for resale. AT&T persisted in this denial despite being first told by this Commission in 2004 that promotions of this type that lasted more than 90 days were presumptively unreasonable, discriminatory and should be for resale unless AT&T could prove the promotions were reasonable and nondiscriminatory. BellSouth/AT&T, reluctantly it appears, changed its policy prospectively and began to accept requests to resale such promotions in July 2007 to align itself with pre-merger AT&T. Even then, as evidenced by its stance in this proceeding, AT&T has continued to deny that these promotions are required to be available for resale for bills that originated prior to its July 2007 change in policy.

We believe that the purpose of the escalation provision was to permit the parties, in good faith, to attempt to resolve disputes prior to resorting to a forum such as this Commission. To be effective, each party has to be open to a negotiated resolution of a disputed issue. Here, because of the unyielding position taken by BellSouth, there could be no negotiated resolution. BellSouth's position was that these cashback promotions were not available for resale. No matter how many times dPi asked BellSouth, the answer would always be the same: denial, because "AT&T did not offer cashback promotions for resale." (Tr. p. 165) Thus, any action taken by dPi to comply with the

[16] See O.C.G.A. 13-4-23 which states: "If the nonperformance of a party to a contract is caused by the conduct of the opposite party, such conduct shall excuse the other party from performance."

escalation process would have been futile. dPi's nonperformance in this regard is therefore deemed to have been excused.

Finally, in this proceeding, AT&T has contended that "[a]s a result of dPi's delay in bringing these claims, AT&T no longer has the records that are needed to determine whether dPi met the qualifications of the underlying promotions with regard to many of the credits", and "that dPi's delay was prejudicial to AT&T..." Further, AT&T contends that dPi is barred from pursuing these claims as a result of the equitable doctrine of laches. Under controlling Georgia law:

> Courts of equity may impose an equitable bar to a complaint when the lapse of time and a claimant's neglect in asserting rights causes prejudice to the adverse party. In determining whether laches should apply, courts consider the length of the delay, the sufficiency of the excuse, the loss of evidence on disputed matters, [and] the opportunity for the claimant to have acted sooner . . . . The defendant must show prejudice from the delay.

Troup v. Loden, 469 S.E.2d 664, 665-66 (Ga. 1996).[17]

As we have previously stated, for the most part, the facts of this case are not in dispute. Briefly summarized, they are: dPi stipulated that in 2004, AT&T told dPi's billing agent it would not provide the cashback credits dPi seeks in this docket. (Exhibit KAS-1). Although it seeks cashback credits for billing periods as far back as November 2003 (Exhibit NWB-1), dPi stipulated that it was not until two years later that dPi's billing agent first asked AT&T for cashback promotional credits on behalf of dPi (Exhibit KAS-4). When AT&T denied those requests, dPi stipulated that its billing agent waited another year before informing AT&T that it disagreed with AT&T's denial of these requests. Further, dPi waited another year to file its Complaint with the Commission—although dPi had ample opportunity to file a complaint for its claims earlier.

While it is undoubtedly true that the testimony in this proceeding indicates that AT&T no longer has records that are needed to determine whether dPi met the qualifications of the underlying promotions with regard to approximately $34,000 of the $156,000 in credit amounts that dPi now seeks in this docket, and that these disputed credits arose from bills that were associated with the billing periods between November 2003 through November 2005, it is also true that AT&T did not attempt to validate these requests when they were submitted because "AT&T did not offer cashback promotions for resale" (Tr. p. 162) and AT&T discarded or deleted[18]

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[17] This is consistent with North Carolina law. *See Harris & Gurganus, Inc. v. Williams*, 37 N.C. App. 585, 246 S.E.2d 791, 794 (1978)(the doctrine of laches is "a rule of equity by which equitable relief is denied to one who had been guilty of unconscionable delay, as shown by surrounding facts and circumstances.")

[18] There is no evidence in the record that these records were inadvertently discarded or deleted. From the testimony, one could infer that AT&T discarded or deleted these records in accordance with its record retention policy or its quest to modernize its procedures. If that is so, AT&T's retention and

information necessary to validate these requests. With regard to the latter facts, the Commission notes that AT&T took those actions even though it knew that the Commission had not pre-approved the restrictions; that the restrictions on resale were presumptively unreasonable and discriminatory; and, that the statute of limitations had not expired on the claims covered by the records.

Given those facts and after carefully reviewing the testimony and the record proper in this proceeding, the Commission concludes that the equitable doctrine of laches does not bar dPi from pursuing these claims for promotion resale credits. Further, the Commission concludes that dPi's delay in bringing this action was neither unconscionable nor prejudicial to AT&T.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 26

This finding of fact is supported by the testimony and cross-examination exhibits of dPi witness O'Roark. In its Complaint, during the hearing, in its Brief and Proposed Order and in its Post-Brief and Proposed Order submission, dPi asserted that it was entitled to a credit for the full face value of a promotional offering. AT&T's contention was that the promotional offering should be reduced by the wholesale discount. O'Roark Cross-Examination Exhibit No. 4 demonstrated, however, that dPi would receive the same benefit of a price reduction equal to a promotional credit only if the wholesale discount were applied to the promotional credits. Table 1 below shows a synopsis of this cross-examination exhibit.

Table 1

Telecommunications Service A with Resale Discount Rate of 21.5%	
Without $25.00 Reduction in Rate	
Retail Rate	$75.00
Wholesale Rate	$58.88
With $25.00 Reduction in Rate	
Retail Rate	$50.00
Wholesale Rate	$39.25
Change in Wholesale Rate	$19.63

In its Proposed Order, the Public Staff supported AT&T's position that dPi would receive the same benefit of a price reduction equal to a promotional credit only if the wholesale discount were applied to the promotional credit. The Public Staff stated that it

modernization practices contravene its ICA1 commitment to consider and resolve billing disputes within six years after the bill was submitted. As a result, AT&T may not use the unavailability of these records as an excuse to invalidate claims that predate November 2005.

supported AT&T's position because AT&T calculated the discount in a manner that was consistent with the Fourth Circuit's analysis in the *Sanford* decision.

The Commission agrees with AT&T and the Public Staff. If the Commission were to adopt dPi's position regarding promotional credits, then dPi would receive a greater benefit than it otherwise would be entitled to receive had AT&T merely reduced the telecommunications service's rate. The example in O'Roark Cross-Examination Exhibit No. 4 demonstrated that the only way a CLP could obtain an equal benefit from rate reduction such as a promotional credit was to reduce the promotional credit by the wholesale discount rate.

dPi's calculation would allow it to receive benefits that reflect the promotions' retail or face value. AT&T's calculation takes the promotion's retail value and deducts the wholesale discount. This is the proper way to calculate the amount of credits owed to dPi. Further, this is consistent with the analysis of the Commission's decision in the *Sanford* decision. (*See Sanford* at pp. 450-51)

The Commission is aware that dPi is strongly opposed to the promotion value being calculated in this manner. In dPi's March 15, 2010, Reply to Public Staff's Proposed Findings and Conclusions (Reply), dPi asserts that it is entitled to "the full amount of the promotions" instead of the amount less the discount. Reply p. 9. Stated more simply, dPi contends that for every $100 coupon offered to AT&T's customers, AT&T would have to provide dPi with a $100 cash payment for each of its customers. The Commission considered and rejected this exact promotion valuation method in *Restriction on Resale Order II*. We stated:

> Moreover, BellSouth's argument seems to contemplate that a gift would be provided directly to the CLP, e.g., if a coupon was offered to BellSouth's customers, BellSouth would have to provide resellers with a $100 cash payment for each of its customers. However, as discussed above, the *benefit* (not the gift itself) would be delivered to the reseller through the wholesale price charged to the reseller, thus, further reducing the likelihood of undue windfall as described by BellSouth. (Emphasis in Original)

Restriction on Resale Order II, p. 7.

This, as well as other passages in the *Restriction on Resale Orders*, makes clear that the face value of the promotion is not required to be passed through to the CLP. Rather, the Order requires only "that the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price be determined and that the benefit of such a reduction be passed on to resellers by applying the wholesale discount to the lower actual retail price." *Restriction on Resale Order II*, p. 6. The credit calculation formula that we have here adopted accomplishes that purpose.

For the reasons stated above, the Commission concludes that the retail amount of the promotional credits due dPi should be reduced by the wholesale discount rate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 27

This finding of fact is supported by the testimony of dPi witness O'Roark and AT&T witness Bracy.

The Commission has determined that dPi's claims are not barred by the billing dispute provisions of ICA2. In Finding of Fact Nos. 21 thru 25, the Commission determined that BellSouth or AT&T, as applicable, unreasonably refused to offer the promotions in question for resale. In Finding of Fact 26, the Commission set out the proper method for calculation of the wholesale rate for these promotions. Before any amounts due can be calculated based on those Findings, there remains one issue outstanding, the validation of the claims.

In its Answer, AT&T demanded that dPi "strictly" prove the amount of the credits that dPi was due. AT&T Answer, ¶9. The law does not require dPi to prove the amount due with absolute certainty. Instead, dPi is only required to introduce evidence to prove the amount due with sufficient completeness and certainty as to permit the finder of fact to arrive at a reasonable conclusion. *Crankshaw v. Stanley Homes, Inc.*, 131 Ga. App. 840, 207 S.E.2d 241(1974). The Commission finds that, in general, dPi has met this burden.

However, it is not clear from the record whether all of dPi's claims are valid. AT&T witness Bracy testified that approximately 33% of dPi's claims had been denied because dPi had either requested the retail value of the promotion or because the end user did not meet the eligibility requirements.[19] Witness Bracy did not break out what portion of the 33% was attributable to incorrect calculation of the value of the promotion and what portion was due to the ineligibility of the end user. Nor did witness Bracy indicate if AT&T denied the claim in total if dPi submitted what the Commission would characterize as a valid claim with an incorrect credit request amount, i.e., dPi requested the retail value of the promotion rather than a credit which reflected the wholesale discount. Similarly, dPi's evidence on this issue was also less than precise. For instance, dPi witness O'Roark admitted that some of dPi's claims may not have reflected the wholesale discount and that "the parties should be able to reach agreement as to the true numbers at issue" in this proceeding. (Tr. p. 56) In any case, the Commission does not believe that the percentage of valid dPi claims since July 2007 should be used as a proxy in this case.

Accordingly, the Commission will order AT&T and dPi to work cooperatively with the Public Staff to determine the "validity" of the claims. Specifically, the parties are to

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[19] In ICA1 and ICA2, dPi and AT&T agreed that "[w]here available for resale, promotions will be made available only to End Users who would have qualified for the promotion had it been provided by BellSouth directly." See http://cpr.bellsouth.com/clec/docs/all states/800f53.pdf at p. 40 or http://cpr.bellsouth.com/clec/docs/all states/80296813.pdf at p. 38, respectively.

determine which claims are invalid because dPi's end user did not meet the eligibility requirements, to determine which claims submitted meet all eligibility requirements and are per se valid, and finally, to determine which claims are valid but failed to reflect the wholesale discount or some other financial factor that would reduce the amount due dPi. Claims shall not be denied because AT&T no longer has the records to validate such claims. After engaging in this process, the parties shall file a joint report with the Commission within 60 days of this order reporting their progress on validation of these claims. As claims are validated, AT&T should make payment to dPi.

IT IS, THEREFORE, ORDERED as follows:

1. That dPi's Complaint is allowed subject to validation of claims.

2. That AT&T and dPi shall work cooperatively with the Public Staff to determine the validity of the claims.

3. That AT&T and dPi shall file a joint report with the Commission within 60 days of this order reporting their progress on validation of these claims.

4. That as claims are validated, AT&T shall make payment to dPi.

ISSUED BY ORDER OF THE COMMISSION.

This the 7th day of May, 2010.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Commissioner William T. Culpepper, III, concurs.
Chairman Edward S. Finley, Jr., dissenting in part.

Lh050710.01

Appendix A

Row	Claim No.	Billing Period	Request for Credit	Days between Billing Period and Request for Credit
1	C2-NC-704-20031108	11/8/2003	1/2/2006	786
2	C2-NC-704-20031208	12/8/2003	1/2/2006	756
3	C2-NC-704-20040108	1/8/2004	1/2/2006	725
4	C2-NC-704-20050108	1/8/2005	1/3/2006	360
5	C2-NC-704-20050208	2/8/2005	12/9/2005	304
6	C2-NC-704-20050308	3/8/2005	12/9/2005	276
7	C2-NC-704-20050408	4/8/2005	1/3/2006	270
8	C3-NC-704-20050408	4/8/2005	4/20/2006	377
9	C3-NC-704-20060108	1/8/2006	12/26/2006	352
10	C3-NC-704-20060208	2/8/2006	12/26/2006	321
11	C3-NC-704-20060308	3/8/2006	12/26/2006	293
12	C3-NC-704-20060408	4/8/2006	12/26/2006	262
13	C3-NC-704-20060508	5/8/2006	12/26/2006	232
14	C3-NC-704-20060608	6/8/2006	12/26/2006	201
15	C3-NC-704-20060708	7/8/2006	8/9/2006	32
16	C3-NC-704-20060808	8/8/2006	12/26/2006	140
17	C3-NC-704-20060908	9/8/2006	12/26/2006	109
18	C3-NC-704-20061008	10/8/2006	12/26/2006	79
19	C3-NC-704-20061108	11/8/2006	12/26/2006	48
20	C3-NC-704-20061208	12/8/2006	12/26/2006	18
21	CB-NC-704-20040908	9/8/2004	12/29/2005	477
22	CB-NC-704-20041108	11/8/2004	12/29/2005	416
23	CB-NC-704-20041208	12/8/2004	12/29/2005	386
24	CB-NC-704-20050108	1/8/2005	12/28/2005	354
25	CB-NC-704-20050208	2/8/2005	12/29/2005	324
26	CB-NC-704-20050408	4/8/2005	12/26/2005	262
27	CB-NC-704-20050508	5/8/2005	12/26/2005	232
28	CB-NC-704-20050608	6/8/2005	12/26/2005	201
29	CB-NC-704-20050708	7/8/2005	3/30/2006	265
30	CB-NC-704-20050808	8/8/2005	12/26/2005	140
31	CB-NC-704-20050908	9/8/2005	12/26/2005	109
32	CB-NC-704-20051008	10/8/2005	12/24/2005	77
33	CB-NC-704-20051108	11/8/2005	12/23/2005	45
34	CB-NC-704-20070408	4/8/2007	NA	NA
35	CB-NC-704-20070508	5/8/2007	NA	NA
36	CB-NC-704-20070608	6/8/2007	NA	NA

Commissioner William T. Culpepper, III, concurring:

Chairman Finley, at page 4 of his dissent, states that "...the cash payments subscribers receive under AT&T's 1 FR + 2 Cash Back program ... are not 'promotions' under the Local Competition Order and FCC rules." Based upon this Commission's prior *Restriction on Resale Orders*, which specifically addressed this issue as to this same offering and which orders were fully affirmed by the majority in *Sanford*,[1] I disagree.

I premise my difference of opinion in this regard on the following *Restriction on Resale Order I* language at pp. 9-10:

> While gift cards, check coupons and other similar promotions or incentives offered for the purchase of a regulated telecommunications service are not themselves services that ILECs offer at retail from their tariffs, they are promotional offerings for telecommunications services. Promotional offerings are subject to the limitations and conditions set forth by the FCC. In ¶ 948 of its Local Competition Order, the FCC stated that Section 251(c)(4)'s requirement that ILECs resell retail telecommunications services
>
>> makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for *all promotional or discount service offerings* made by incumbent LECs. [Emphasis added.] A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act. In discussing promotions here, we are only referring to price discounts from standard offerings that will remain available for resale of wholesale rates, *i.e.*, temporary price discounts.

[1] "Accordingly, we reverse the judgment of the district court and remand with instructions to enter summary judgment in favor of the Commissioners of the NC Commission." Sanford at 442.

The Commission interprets ¶ 948 of the FCC's Local Competition Order to mean that an ILEC's duty to resell telecommunications services it offers at retail does not exclude an ILEC's promotional offerings. The FCC clearly stated that any other conclusion would allow ILECs routinely to create promotions or nonstandard offerings just to avoid their resale obligation. The FCC was concerned that ILEC promotions could become *de facto* standard offerings that would not be made available to resellers and would therefore undercut the duty to resell retail services to resellers at wholesale rates. **The FCC's statement that the subject of its discussion on promotions referred to "price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.* temporary price discounts," does not define or limit the term "promotion," as used by the FCC in its Order, to a reduction from the retail price of a tariffed service.** Rather, the FCC was speaking to the temporary nature of a promotion. The term "promotion" in the context of a sale or advertising campaign usually refers to an opportunity or offer that is temporary or short-term, rather than one that is more permanent or long-lasting. The FCC distinguished a promotional price discount from a "standard offering" that would remain available for sale at retail and therefore available for resale at the wholesale rate. Contrasted with a promotional offering, a standard offering is one that is of a more permanent, long-lasting nature. **When the reference to a promotion as a price discount is read in context, the Commission believes it is clear that the FCC was not stating that a promotion exists only when there is a reduction or discount of the retail price of a telecommunications service.**

(Emphasis supplied)

\s\ William T. Culpepper, III

Commissioner William T. Culpepper, III

DOCKET NO. P-55, SUB 1744

Chairman Edward S. Finley, Jr., dissenting in part:

I dissent from Finding of Fact 24 and from the discussion within the Evidence and Conclusions in support thereof set forth on pages 11 through 14.

The issue of whether AT&T or its predecessor BellSouth should make payments under its promotional offerings such as 1FR + 2 Cash Back to CLPs such as dPi has a substantial history in North Carolina. In 2004 the Commission opened a generic docket (P-100, Sub 72) to address issues arising from promotional offerings such as 1FR + 2 Cash Back, give aways such as toasters and gifts such as Wal-Mart gift cards. BellSouth argued that its promotional offerings were not telecommunications services so that under the pertinent federal statutes, orders and rules (47 U.S.C. § 251(c)(4), the FCC's Local Competition Order[1] and 47 C.F.R. § 51.605 et seq.) the Commission lacked the authority to compel BellSouth to make these promotional offerings BellSouth made available to its retail customers to its wholesale customers like dPi. BellSouth argued that the promotional offerings were marketing costs, not reductions in BellSouth's tariffed rate and therefore not the type of promotional rates addressed by § 251(c)(4) and the FCC rules.

In its December 22, 2004, order in the generic docket the Commission determined that it had the authority to compel BellSouth to make the economic value of the promotional offerings available to wholesale resellers unless BellSouth could show that the offerings were reasonable and nondiscriminatory. In response to BellSouth's arguments that the Commission lacked this authority, the Commission reasoned that while the promotional offerings were not reductions in the retail tariff rates per se, they nevertheless had "economic value" that affected de facto the value of service the retail consumer received and therefore the Commission was authorized to require BellSouth to make the promotional offerings available to BellSouth's wholesale customers. Each promotion should be considered on a promotion by promotion basis.

One of the criteria the Commission indicated it would use to determine whether the promotional offering should be given to CLPs was the offering's duration. Relying on ¶¶ 448 and 449 of the Local Competition Order and 47 C.F.R. § 51.613(a)(2)(i), the Commission would look to see whether the promotional offering was or was not limited to 90 days in duration. In its discussion the Commission did not address the issue of whether in applying this durational criterion a distinction should be made between programs that affected the ILEC's tariffed rates each month for fewer or more than 90 days or programs that lasted for 90 days or more but had an economic value that only affected the benefits the retail customer received once, i.e., one time promotions.

The Commission recognized that the promotional offerings could have both pro and anti competitive consequences. Promotional offerings benefit retail consumers and

[1] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15, 499 (1996).

in that sense are procompetitive.[2] However, if the promotional offering reduces the ILEC's retail rate for a significant period of time, the CLP reselling BellSouth's services receives insufficient margin between the wholesale rate (absent the value of the promotional offering) it pays BellSouth and the retail rate it must charge its subscribers to compete and becomes the victim of a price squeeze. See BellSouth Telecom, Inc. v. Sanford, 494 F.3d 439, 451 (4th Cir. 2007).

Significantly, the Commission addressed BellSouth's 1FR + 2 Cash Back promotion in detail:

> With respect to BellSouth's 1FR + 2 Cash Back promotion, based on the Commission's current knowledge, the Commission would be inclined to find that a restriction on resale is reasonable and nondiscriminatory. Resellers have not complained or asked the Commission to find the restriction unreasonable or harmful to competition.[3] Resellers have not been precluded from reselling the regulated service and are able to purchase the service at the tariffed rate minus the wholesale discount. The wholesale discount was, in part, set by deducting the ILEC marketing expense from the ILEC's cost for the regulated service – at least in part in recognition that resellers have their own marketing expenses. Resellers remain free to offer, at their own expense, promotional discounts to customers who purchase the tariffed service(s) from them. Although the Commission would ordinarily be concerned about a promotion in competition with the tariffed offering for a nine-month period (from June to March), BellSouth's promotion will be offered for a limited time, and the resellers' apparent disinterest or indifference would tend to persuade the Commission that, at least with respect to 1FR + 2 Cash Back, the anti-competitive effects caused by a nine-month promotion that is unavailable to resellers are outweighed by the procompetitive effects.

Docket No. P-100, Sub 72(b), December 22, 2004, Order, p. 13.

BellSouth challenged the Commission's orders in Federal District Court. The District Court held that because the promotional offerings, such as gift cards, were not "telecommunications services" under 47 U.S.C. § 251(c)(4), they were not subject to BellSouth's resale duty. The Court also concluded that the promotional offerings were not "price discounts" under the FCC requirements that BellSouth pass on discounts and promotions to competing providers.

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[2] The FCC also recognized that short term promotions serve pro-competitive ends through enhanced marketing and sales based competition. Local Competition Order, ¶¶ 948, 949.

[3] Even now, only one reseller, dPi, complains. dPi's complaint arises from the efforts of dPi's billing agent, Lost Key, to collect promotions. dPi paid Lost Key substantial fees in return for its successful promotion collection efforts. Tr. pp. 68-70. Of course, the Commission's guidance would have been unnecessary if its anticipation was that no CLP would ever complain.

Upon appeal to the Fourth Circuit, that Court reversed the District Court. The Fourth Circuit held that the incentives offered for longer than 90 days affected the fees subscribers pay for the tariffed services and therefore change the actual retail rate.

The Fourth Circuit issued a majority and a concurring opinion. The majority opinion, like the Commission's, does not address the distinction between a promotional program offered for greater than 90 days providing any single consumer a one-time economic benefit and a promotional offering that affects the tariffed rate for each month for more than three months. In fact the majority describes the promotional offerings at issue differently at varying points in its decision. At one point the majority used the oxymoronic "one-time incentives for more than 90 days." Sanford, at 444, 450. "Accordingly, the North Carolina Commission concluded that telecommunications . . . must be resold to competing LECs 'at rates that give the resellers the benefit of the change in rates brought about by offering one-time incentives for more than 90 days.'" (emphasis in the original). Id. at 444, 450. Elsewhere, the majority describes the incentives in terms of recurring monthly rate reductions. "Suppose BellSouth offers its subscribers residential telephone service for $20 per month. Assuming a 20% discount for avoided costs, . . . BellSouth must resell this service to competitive LECs for $16 per month, enabling the competitive LEC to compete with BellSouth's . . . retail fee. Now suppose BellSouth offers its subscribers telephone service for $120 per month, but sends the customer a coupon for a monthly rebate check for $100." Id. at 450-51. Of course, one-time offerings, in contrast to the majority's hypothetical, cannot reduce any consumer's bill more than in the first month. See, Id. at 457 (Chief Judge Williams concurring).

Chief Judge Williams, concurring in the result that in a given case the Commission had authority to order an ILEC to make the promotional offering at issue available to competing resellers, determined as had the District Court that one-time promotional offerings such as 1FR + 2 Cash Back were not tariffed rate discounts per se and therefore not "promotions" as referred to in ¶¶ 48 and 49 of the FCC's Local Competition Order and FCC Rule 47 C.F.R. § 51.613(a)(2)(i). Chief Judge Williams determined that for one-time promotional offerings the shorter than, longer than 90 day analysis did not apply. "... the FCC's Local Competition Order limits the scope of the term 'promotions' and therefore forecloses the interpretation adopted by the NCUC." Sanford at 455-56. "The FCC (in the Local Competition Order) was 'only referring to price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts.'" Id. at 456. "Section 51.613(a)(2)(i) and the Local Competition Order . . . do not broadly encompass 'something of economic value' . . ., but instead contemplate only 'temporary price discounts' giving rise to 'special promotional rates.'" Id. Chief Judge Williams classified the offerings as inducements to subscription (Id. at 457), not promotions as addressed by the FCC. He concluded that restrictions on the gift offers had lesser anti-competitive effect than promotions. Id. at 456, 458.

Consideration of the one-time gift offers addressed by the NCUC's orders reveals an important distinction between such offers and price discounts.

> A customer must continue to subscribe to an incumbent LEC's services to receive a discounted rate for these services. Customers receiving one-time gifts with no corresponding obligation to commit to a particular term of service, in contrast, may attempt to take advantage of the special offer by signing up for the gift benefit and cancelling the service soon or shortly thereafter. Moreover, the time period during which the incumbent LEC makes a one-time gift offer available does not affect the value of the gift. With a direct price discount (or a recurring gift benefit), the longer the discount is offered, the more savings a customer receives. With a one-time gift offer, in contrast, the customer receives the same gift regardless the duration of the offer, thus, whether the offer extends for more than 90 days would have a minimal impact on the anticompetitive effects of the special offer.

Id. at 457-58.

In spite of the Commission's statements in P-100, Sub 72 that 1FR + 2 Cash Back, even though the program lasts for more than 90 days, appears reasonable and procompetitive, the panel majority renders just the opposite conclusion in this case and gives as its first and primary justification the fact that the program lasts for more than 90 days. Also, in spite of the extensive discussion in Sanford as to whether duration of a program consisting of one-time promotional offerings has any effect on the ability of CLPs to compete, the majority does not address this issue. In defining the burden by which the ILEC's evidence is to be judged, the majority makes no distinction between one-time inducements to subscription and recurring promotions as addressed by the FCC. Significantly, no party in this docket raises this issue or discusses it at all.

I am persuaded by the uncontradicted analysis of Chief Judge Williams that the cash payments subscribers receive under AT&T's 1FR + 2 Cash Back program, while providing value to the subscriber, are not "promotions" under the Local Competition Order and FCC rules.[4] The subscriber receives a one-time benefit or sign up bonus that does not recur from month to month, and the duration of the program has minimal effect on competitors like dPi. I also agree with the Commission's conclusion in P-100, Sub 72 that the procompetitive features of 1FR + 2 Cash Back outweigh any anticompetitive ones, especially with respect to AT&T's competitive posture vis-à-vis dPi.

I likewise conclude that AT&T does not compete with dPi for the same retail customers. I disagree with the majority that the record before us supports the conclusion that the two carriers compete for any retail customers. AT&T's witnesses testified that they did not compete. Tr. p. 147. dPi witness O'Roark testified at length in his unscripted summary that dPi serves a niche market of "working poor" that conventional carriers like AT&T seek to avoid. Tr. pp. 58-59. ". . . we feel like we

[4] While Chief Judge Williams' analysis occurs in a concurrence, this is the only place in Sanford where the issue is directly addressed. Nowhere in the majority opinion is there any rebuttal to Chief Judge Williams' analysis and conclusions.

provide a valuable and needed service in our prepaid niche that's not served by BellSouth and it's not served by any . . . post paid provider." Tr. p. 59. dPi serves subscribers with poor credit or a history of nonpayment who are forced to pay in advance for monthly telephone service. AT&T, in contrast, provides service in advance, charges in arrears, requires deposits to assure payment, and rejects customers with a poor credit record. AT&T's basic retail price is $19.95, dPi's is $39.99, $20 higher. Tr. pp. 80-83, AT&T O'Roark cross Ex. 2. It defies logic to suggest that any customer would pay in advance $20 more per month for service from dPi if the customer were one AT&T or other conventional carriers sought or were willing to serve.

The anticompetitive harm the FCC and the federal courts identify in preventing restrictions on the resale of promotional rates is a price squeeze. dPi charges what the market it serves will bear. dPi's success in its market appears independent of AT&T's promotion practices and responsive instead on actions of other carriers. Tr. pp. 85-86, 109-10. Its market consists of subscribers conventional carriers actively seek to avoid. dPi's retail prices do not change in reaction to fluctuations in the retail rates AT&T charges or else they would not be $20 higher.

Significantly, dPi forcefully resisted AT&T's efforts to discover whether dPi passes the economic value of the promotions it receives from AT&T to dPi's customers. The inference to be drawn from this resistance is that dPi does not, thus further supporting the evidence that dPi's competitive position is not diminished by AT&T's restriction. If dPi does not provide the incentive to its subscribers, forcing AT&T to make the incentive payment to dPi results in the harm ILECs complain of where they "pay[ ] for those incentives twice – once in paying for the incentives and again in reducing [their] retail rates for [their] competitor." The harm CLPs complain of is not present: "they would have to pay for the incentives twice in order to compete – once when they pay for the service at a wholesale rate that is not adjusted for the incentives and again when they pay for similar marketing incentives to offer their own customers." Sanford at 452. Therefore, it is unreasonable to assume that a restriction on AT&T's 1FR + 2 Cash Back offering (a one time payment) will impose a price squeeze on dPi, reducing dPi's ability to compete with AT&T.

AT&T has the burden of showing that restrictions on resale are not unreasonable and discriminatory. 47 C.F.R. § 51.613(b)[5] AT&T presented through direct and cross examination testimony, exhibits and post hearing arguments substantial evidence and persuasive argumentation to make this showing. AT&T's evidence and position support the Commission's 2004 conclusion that the one-time offerings are reasonable and procompetitive. dPi did not address the evidence, arguing instead against a nonexistent AT&T argument that the incentives were not telecommunications service. The Public

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[5] Even if the 90 day durational threshold set forth in 47 C.F.R. § 52.613(a)(2)(i) applied, and a recurring month to month promotion exceeded 90 days, the ILEC may still demonstrate that the restriction on resale is reasonable and nondiscriminatory and avoid the requirement that the promotion go to the resellers. "(b) With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose restrictions only if it proves to the state Commission that the restriction is reasonable and nondiscriminatory ." (emphasis added)

Staff mentioned the issue only briefly and for the most part avoided its merits.[6] AT&T's unaddressed and unrebutted evidence and arguments satisfy its burden.

One time incentives, not part of any ILEC tariff, qualify for pass through treatment to resellers under 47 U.S.C. § 251(c)(4), but only just. Both the Commission and the Fourth Circuit agree that they do not rise to the level of recurring per se tariffed rate discounts as contemplated and addressed by the FCC. Sanford at 457-58. Their "economic value" is of a lesser brand. By definition their potential anti-competitive harm to resellers is less than that of "promotions" as defined by the FCC. As only inducements to subscription, the duration of the program of which they are a part is not a negative factor in determining the reasonableness and discriminatoriness of ILEC restrictions on them. This case, unlike the 2004 generic docket, requires the Commission to articulate in greater specificity the justification of the legal standard it will apply in weighing ILEC evidence. In my view the majority has misapplied the standard from the FCC's orders and rules and has penalized the ILEC impermissibly through its emphasis on the duration of the 1FR + 2 Cash Back and similar programs. Disregarding the Commission's own guidance in Docket No. P-100, Sub 72 that these offerings are of lesser value than recurring tariffed offerings and are presumptively reasonable and nondiscriminatory, the majority has imposed a standard on AT&T that assumes just the opposite. dPi, serving a niche market, must do more to receive the diminished "economic value" of the one-time incentive than it has done in this case.

\s\ Edward S. Finley, Jr.
Chairman, Edward S. Finley, Jr.

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[6] The Public Staff relies primarily on the post merger (2007) change in policy. What AT&T's policy was with respect to wholesale restrictions on offerings such as 1FR + 2 Cash Back before its merger with BellSouth or thereafter sheds no light on the merits of the reasonableness or competitive nature of the incentives at issue. This issue has been addressed extensively by this Commission, the United States District Court for the Western District of North Carolina and the Fourth Circuit. This precedent along with the 96 Act and FCC rules and orders are the proper reference, not AT&T's business decisions or policy decisions at other times and in other jurisdictions. Moreover, pre-merger AT&T's legal position before the FCC was that the one-time offerings were not telecommunications services or promotional discounts subject to resale obligations. Attachment C – AT&T's post hearing brief.

ATTACHMENT C

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1744

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of dPi Teleconnect, LLC, Complainant v. BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina, Respondent	)))))))))	ORDER DENYING EXCEPTIONS AND AFFIRMING THE RECOMMENDED ORDER

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina on Monday, July 12, 2010, at 2:00 p.m.

BEFORE: Commissioner William T. Culpepper, III, Presiding, Chairman Edward S. Finley, Jr., Commissioner Lorinzo L. Joyner, Commissioner Bryan E. Beatty, Commissioner Susan W. Rabon, Commissioner ToNola D. Brown-Bland and Commissioner Lucy T. Allen

APPEARANCES:

For dPi Teleconnect, LLC:

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EXHIBIT
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For the Using and Consuming Public:

> Lucy E. Edmondson, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On April 11, 2008, dPi Teleconnect, LLC (dPi) filed a complaint against BellSouth Telecommunications, Inc. dba AT&T North Carolina (BellSouth or AT&T) seeking to recover cashback promotional credits allegedly owed pursuant to the parties' interconnection agreements(ICAs). An evidentiary hearing was held on November 12, 2009 before a Panel consisting of Commissioners Culpepper, Finley and Beatty. On May 7, 2010, the Panel, with Chairman Finley dissenting in part, issued a Recommended Order holding, in pertinent part, that:

1. After fully considering the arguments, the evidence, the transcript and the record proper, AT&T failed to prove that the restrictions that it placed on the resale of the cashback promotions were narrowly tailored, reasonable, and nondiscriminatory.
2. AT&T may restrict resale of promotions that are offered in excess of 90 days without securing pre-approval from this Commission to do so.
3. As required by its ICA agreement with AT&T, dPi has filed its claims in a timely manner.
4. dPi's claims are not barred by the doctrine of laches.
5. AT&T is allowed to calculate the value of the promotional discount by deducting the wholesale discount from the retail value of the promotion.

In a written dissent, Chairman Finley articulated reasons for his disagreement with the majority holding that AT&T failed to prove that the resale restrictions were narrowly tailored, reasonable, nondiscriminatory and, thus, not harmful to competition. Chairman Finley concurred with the remaining conclusions of the Panel.

On June 24, 2010, dPi and AT&T each filed exceptions to the Recommended Order. dPi excepted to the Commission's determination that AT&T may restrict resale of promotions that are offered in excess of 90 days without securing pre-approval from this Commission and that AT&T is allowed to calculate the value of the promotional discount by deducting the wholesale discount from the retail value of the promotion. AT&T excepted to the Commission's determinations: that AT&T had not shown that its refusal to allow resale of the cashback promotions in question was narrowly tailored, reasonable and nondiscriminatory; that dPi filed its claims in a timely manner as required by the parties' ICAs; and, finally, that dPi's claims are not barred by the doctrine of laches.

On July 12, 2010, the Full Commission heard arguments from dPi, AT&T and the Public Staff regarding the exceptions filed by dPi and AT&T. After fully considering the exceptions, the arguments of the parties, the evidence, the transcript and the record proper, the Commission specifically rejects the individual exceptions to the Recommended Order filed by dPi and AT&T and affirms the finding of facts, conclusions, and rationale of the Recommended Order. The following is offered as additional support for the Recommended Order conclusion that AT&T failed to prove that its resale restrictions were reasonable, nondiscriminatory and, thus, not harmful to competition.

I. Duration of Promotions

In this case, BellSouth offered three cashback promotions as inducements for customers to subscribe to BellSouth telecommunications service instead of choosing a competitor. The promotions offered one time financial inducements of $50 or $100 respectively. Two of the promotions were offered for 16 months and the third was offered for 48 months.[1] BellSouth refused to offer those promotions to competitors at the wholesale rate for resale. AT&T attempted to justify its refusal to allow its competitors to purchase those promotions for resale at wholesale rates by contending that its decision to do so was reasonable and nondiscriminatory.

Pursuant to 47 USC 251(c)(4), an incumbent local exchange company (ILEC) such as BellSouth has a duty to offer any telecommunications service that it offers to its retail customers to competing local providers (CLPs) at wholesale rates. In doing so, the ILEC may not prohibit or impose unreasonable or discriminatory limitations on the resale of such telecommunications service. 47 USC 251(c)(4)(B). The Federal Communication Commission (FCC) has concluded "that resale restrictions [imposed by an ILEC] are presumptively unreasonable." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶939 (1996)(*Local Competition Order*). Further, the FCC and this Commission have interpreted this legislation to require ILECs to offer any discount promotion that lasts for more than 90 days to CLPs for resale at the wholesale discount unless the ILEC proves to the state commission that the restricted resale of the promotion in question is reasonable and nondiscriminatory. 47 C.F.R. 51.613(b).

Discount promotions that last for more than 90 days are subject to this scrutiny because Congress and the FCC have devised a carefully constructed statutory and regulatory scheme to foster competitive alternatives to the ILECs. At its core, this scheme requires ILECs to sell telecommunications services to CLPs at wholesale rates, so that CLPs could then offer the services to consumers at retail on a competitive basis. 47 U.S.C. 251(c)(4). The wholesale rate calculation, which was determined by subtracting an ILEC's avoided costs from the ILEC's "retail rates charged to subscribers for the telecommunications service," is totally dependent upon the establishment of the retail rate. 47 U.S.C. 252(d)(3). Because the wholesale rate calculation is dependent on the retail rate determination, ILECs might undermine this carefully crafted scheme to foster competitive alternatives by manipulating the retail rate, by refusing to allow the resale of discount promotions, or by placing onerous restrictions on the resale of these promotions, particularly when the discount promotion being offered is offered on a long term basis.

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[1] For purposes of this discussion, promotions offered for 91 days or more are characterized as long term promotions. Promotions offered for 90 days or less are characterized as short term promotions.

The FCC was particularly concerned that ILECs would use long-term discount promotions "to avoid the statutory resale obligation by shifting customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act." *Local Competition Order* ¶948. Or, as the Commission stated: "[t]he FCC was concerned that ILEC promotions could become *de facto* standard offerings that would not be made available to resellers and would therefore undercut the duty to resell retail services to resellers at wholesale rates." *Restriction on Resale Order I*, p. 9. Later, in the same Order the Commission stated: "that the longer such promotion is offered, the more likely the savings will undercut the tariffed retail rate and the promotional rate becomes the real retail rate available in the marketplace." *Restriction on Resale Order I*, p. 11. Further, the Commission stated that:

> The promotion reduces the subscriber's cost for the service by the value received in the form of a giftcard or other giveaway. The tariffed retail rate would, in essence, no longer exist, as the tariffed price minus the gift card received for subscribing to the regulated service, i.e., the promotional rate, would become the real "retail" rate. Thus, the ILEC could use the promotion as a *de facto* rate change without changing its tariff pricing. The FCC hoped to avoid this situation, where the promotional rate competes with the tariffed price for a long or indefinite period of time, by defining the point at which the promotional rate would become a retail rate to be discounted for resale as the 91st day the promotion is available to end-users purchasing a particular telecommunications service. In other words, the FCC decided that after 90 days, resellers are entitled to the promotional rate (the "real" retail rate) minus the wholesale discount.
>
> *Restriction on Resale Order I*, p. 11.

It is evident from the above quoted passages that the FCC had three primary concerns. First, the FCC was concerned that ILECs would use long term discount promotions to undercut the retail rate. Second, the FCC was concerned that ILECs would use the long term availability of these discount promotions as a nonstandard offering thereby changing the retail rate without changing the tariff or standard pricing. Third, and finally, the FCC was concerned that ILECs could utilize the same discount promotions to avoid its statutory resale obligations. In the FCC's opinion, neither of these alternatives was desirable and indeed, neither of these alternatives is permitted. After carefully reviewing the evidence presented in this proceeding and the arguments presented, the Commission concludes that the FCC's concerns were well warranted.

In the present case, AT&T designed and implemented long term discount promotions which were intended to: (1) undercut the retail rate; (2) allow it to move customers to a nonstandard offering at a price lower than its regular retail or tariffed rate; and, (3) permit it to avoid its statutory obligation to resell telecommunications services to CLPs for the promotional price minus the wholesale discount.[2] As a direct result of the design and the implementation of these promotions, the tariffed price for

[2] "[W]hen a promotional price ceases to be short-term...[it] must be treated as the retail rate to be used in calculating the wholesale rate." Restriction on *Resale Order I*, p.11.

local service is meaningless. The promotional price, not the tariff price, is the *de facto* retail price to purchase local service. AT&T can and does provide service to customers that have left AT&T and are searching for a telecommunications service provider for a price that is lower than its tariffed price. And, AT&T has refused to sell local service to CLPs at the statutorily required price, i.e. the discount price minus the wholesale discount by contending that it does not have to offer the promotion for resale.

Thus, the promotions as designed and implemented provide AT&T with substantial competitive advantages when it competes for customers in the residential telecommunications services market. By contrast, CLPs are saddled with significant financial disadvantages. By the design and implementation of these long term promotions, AT&T has eviscerated the carefully crafted resale scheme which was created by the FCC to permit ILECs and CLPs to compete on a fairly equal basis for customers.[3] For these reasons, the Commission concludes that the resale restrictions imposed by AT&T are unreasonable and discriminatory.[4]

II. Residential Market Examination

At trial and during the subsequent oral argument, AT&T suggested that the Commission's inquiry to determine whether AT&T's restriction on resale of these cashback promotions is reasonable and nondiscriminatory should focus on dPi and the sub-residential market that it serves rather than pursue a more broadly based inquiry based upon the residential market as a whole. If the examination is limited in such a manner, the pertinent evidence quite clearly indicates that dPi primarily serves the credit challenged residential market while AT&T generally does not. dPi charges substantially more for service than AT&T. Because dPi focused primarily on the credit challenged market and charged substantially more for retail service, AT&T argued that its refusal to allow the resale of the promotions by dPi was reasonable and nondiscriminatory. Based on the evidence, the Panel Majority found this evidence and argument unpersuasive. We concur with this conclusion in this Order for the reasons given in the Recommended Order.

In doing so, the Commission notes that during the July 12, 2010, oral argument, the Public Staff argued for the first time that it was appropriate for the Commission to

[3] In its brief, dPi suggested that the AT&T's resale restrictions on these cashback promotions were predatory and resulted in a price squeeze. Typically, these terms are associated with an antitrust action and have a specific meaning in that context. During oral argument, dPi's counsel clarified that dPi was not contending that AT&T had violated the federal antitrust laws. Instead, dPi contended that AT&T's promotional pricing scheme violated the Telecommunications Act. Because the Act has much more ambitious goals than the antitrust statutes, we agree with dPi and decide this case under the Act rather than the antitrust statutes. See *Verizon v. Trinko*, 540 U.S. 398, 415, 124 S.Ct. 872 (2004).

[4] Although the harm inflicted by AT&T's refusal to sell the telecommunications service at the proper rate is diminished somewhat by AT&T's voluntary decision to offer only one-time incentives rather than monthly reductions of the bill as inducements to purchase, the use of one-time inducements does not completely mitigate the anticompetitive effects of the promotion particularly when the one-time nature of the inducement is balanced against the amount of the one-time award combined with the length of time the inducements are offered to potential customers.

consider the broader residential market rather than the smaller credit challenged segment of the residential market served by dPi and other prepay providers when determining whether the resale restrictions on these cashback promotions were reasonable and nondiscriminatory. In our view, the broader based inquiry is completely appropriate. That is, the Commission's inquiry, in the context of dPi's complaint, should focus on whether AT&T's refusal to allow any CLP serving the residential market to resell these cashback promotions is reasonable and nondiscriminatory and not just its refusal to provide the benefits of these promotions to dPi alone.

Prior to 2007, AT&T's policy stated that it would not offer the cashback promotions that are the subject of these proceedings to CLPs for resale. The policy applied across the board and was not limited to any particular segment of the residential market.[5] It applied to CLPs such as dPi that served the credit challenged market as well as CLPs that served or desired to serve the exact same clientele served by AT&T. Because AT&T's restrictions on resale apply to any CLP serving the residential market and is not confined to CLPs such as dPi that serve the credit challenged sub-market, the Commission's inquiry into the reasonableness of AT&T's restrictions on cashback promotions is not appropriately limited to the impact of the restriction on dPi alone merely because dPi is the Complainant.

Instead, the Commission's inquiry is broader and focuses on the reasonableness of AT&T's restrictions on the promotions as they apply to all CLPs in the residential market. Once a complaint was filed (whether by one or more resellers or whether by any other party with standing) it was incumbent upon AT&T to prove that its promotions, as they were designed and implemented in the residential market, were reasonable and nondiscriminatory. The promotions challenged by dPi were designed and implemented not to be offered to competing residential resellers and so the Commission's inquiry must focus on this broad restriction of the promotion—not on the narrow question of the promotion's effect on dPi alone. Of course, any examination of this sort must, however, be conducted in light of the pro-competition policies of the Telecommunications Act. *Local Competition Order,* ¶949.

When the resale restrictions are examined based upon this perspective, it is clear that AT&T gains short and long term competitive advantages in the residential market from its ability to restrict resale of a promotion that offers discount pricing to prospective purchasers of local service. The converse of that proposition is also clear. That is, AT&T's competitors in the residential market are greatly disadvantaged in the short <u>and</u> long term by AT&T's restrictions prohibiting the resale of this discount pricing promotion. While the FCC permits AT&T's competitors to be disadvantaged in the short term by discount pricing because it believes that, "if promotions are of limited duration, their pro-competitive effects will outweigh any potential anticompetitive effects," *Local Competition Order,* ¶949, the FCC does not permit AT&T's competitors to be disadvantaged over the long term unless AT&T proves to this Commission that its resale restrictions are reasonable and nondiscriminatory. In that situation, the FCC

[5] If AT&T's resale restrictions are limited to CLPs serving particular segments of the residential market, AT&T must prove that such limitations are not discriminatory.

presumes that the anticompetitive effects of restricting resale of long term promotions will outweigh the pro-competitive effects. For the reasons stated in Section I of this Order, the Commission finds that AT&T failed to overcome the presumption that these resale restrictions were unreasonable or to prove that that the pro-competitive attributes of these long term cashback promotions outweighs the anticompetitive effects. For these reasons and the reasons and rationale set forth in the Recommended Order, the Commission affirms the Recommended Order's conclusion that AT&T failed to prove that its resale restrictions were reasonable and nondiscriminatory.

IT IS, THEREFORE, ORDERED that the exceptions filed by dPI and AT&T respectively are denied and the Recommended Order is Affirmed.

ISSUED BY ORDER OF THE COMMISSION.

This the 1st day of October, 2010.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Chairman Edward S. Finley, Jr., dissenting.

Lh100110.01

DOCKET NO. P-55, SUB 1744

Chairman Edward S. Finley, Jr., dissenting in part:

For reasons stated in my May 7, 2010 dissent from the Recommended Order, as elaborated upon below, I dissent from that portion of the Order Denying Exceptions and Affirming Recommended Order that would provide complainant dPi any monetary relief in this docket.

The promotional offerings at issue in this complaint docket are one time checks AT&T delivers to its retail customers upon their subscription to residential rate schedule 1FR + 2 (at least one access line plus two features, such as call waiting or call forwarding). AT&T gives the subscribers the check upon sign up without a requirement of continued subscription to the underlying service thereafter. The subscriber need not use the check to purchase any service from AT&T. The obligation to provide the check is not set forth on any rate schedule or tariff. During the 2003-2007 period in question AT&T left the program, a part of which made the subscription check available, in place for many months.

In 2004 in generic Docket No. P-100, Sub 72, the Commission addressed and resolved the issue of whether it had authority in given situations to require AT&T and other ILECs to resell the subscription incentives to CLPs as part of the resale of telecommunications services required to be resold by TA-96. The Commission determined that it indeed possessed such authority because the promotion was an "item of value" that affected the price of the underlying service the subscriber received. The Commission classified this promotional facet of the offering as a "de facto" offering as contrasted from a "per se" or "de jure" offering because the offering was not a tariffed rate discount that appeared as an offset to the standard service offering on the tariff or on the customer's bill and was not used to purchase telecommunications services. Significantly, the Commission concluded that this distinction meant that the potential anticompetitive harm to the wholesale customers from the de facto offering was less than had the promotion been a de jure one.

Although the Commission concluded that the promotional facet of the offering was not de jure, the Commission nevertheless proceeded to look to the FCC orders and regulations, which the federal agency adopted exclusively for de jure offerings, to determine how the Commission should exercise its authority in a given case to determine whether to require or not require the ILEC to resell the promotion as part of the resale of the underlying standard offering.

I.

A.

In this complaint docket dPi seeks recovery in the form of monetary relief for an identified level of alleged overcharges during 2003-2007. In granting a portion of this monetary relief, the Commission determines that AT&T must resell the one-time check promotion to dPi primarily because it concludes, without expressly stating why, that the duration of the promotion exceeds ninety days as it (presumably) interprets the FCC's orders and rules. In so doing the Commission looks solely to the duration of the 1FR + 2 standard rate portion of the offering to the exclusion of the length of the one time delivery of the check. Under the Commission's ruling the Commission requires resale of the one-time de facto promotion even though if the promotion were a de jure one set forth in tariff and charged on the retail subscriber's bill, under the FCC's rules and orders, no resell requirement exists whatsoever. In stark contrast to its conclusion that these de facto promotions are of lesser potential anticompetitive harm to the wholesale reseller, the Commission has required resale when the FCC would have allowed the ILEC to restrict resale of a de jure promotional rate discount. In so doing the Commission has committed a significant error.

Moreover, the Commission relies heavily upon presumptions that the promotions at issue are anticompetitive through reference to FCC pronouncements addressing longer term recurring de jure promotions. Again, however, if the one-time checks were instead one-time rate discounts, or even three month rate discounts, under the FCC orders and rules, the ILEC either can restrict resale through reference to language classifying the rate discount as completely exempt from the resale obligation or through reference to other language stating that the restriction is presumptively permissible. The Commission has relied on the wrong presumptions and, in so doing, compounded its error.

B.

The pertinent FCC pronouncements occur in ¶¶ 949 and 950 of the August 1996 Local Competition Order and 47 C.F.R § 51.613(a) of the FCC's regulations issued at the same time. These pronouncements address the duration of promotions, which the FCC determined to be of paramount significance in determining whether a restriction on their resale was pro or anti competitive and consequently whether a restriction on resale was permissible or not. Generally speaking, the FCC determined that promotions of ninety days or less are procompetitive and may be restricted, while longer ones are anticompetitive and may not be restricted.

The FCC pronouncements address exclusively rates and rate discounts, or de jure as opposed to de facto offerings, so the pronouncements address separately "standard rate offerings", which in the case of 1FR + 2 Cash Back are the access line and two features, and in contrast "non standard rate offerings", which in this case would be the standard offering less the one-time check (if the check were a de jure rate discount). Non standard offerings encompass, among other offerings, "temporary" promotional offerings. The temporary offerings are further divided into "short term" temporary offerings and (by implication) long term temporary offerings. Short term temporary promotional rate offerings are more specifically defined as those lasting for ninety days or less.

In particular, in paragraph 949 of the Local Competition Order the FCC states "We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation." The discussion continues in paragraph 950: "We believe promotions of up to 90 days, when subjected to the conditions outlined below, will have significantly lower anticompetitive potential, especially as compared to the potential procompetitive marketing uses of such promotions. We therefore establish a presumption that promotional prices offered for a period of ninety days or less need not be offered at a discount to resellers."

These FCC conclusions from the Local Competition Order are codified in FCC Rule § 51.613(a):

> (a) Notwithstanding § 51.605(b), the following types of restrictions on resale may be imposed:
>
> 2. Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate[6] for a retail service rather than the special promotional rate[7] only if:
>   (i) Such promotions involve rates that will be in effect for no more than 90 days, and
>   (ii) The incumbent LEC does not use such promotional offerings to avoid the wholesale rate obligation, for example, by making available a sequential series of 90-day promotional rates.

The Commission has misread and misinterpreted these FCC pronouncements. The FCC is unconcerned with how long promotional offerings such as 1FR + 2 Cash Back (if it had been a de jure offering) remain in place so that new retail customers can subscribe. Instead, the FCC is concerned with how long any particular subscriber must continue to receive service under the standard rate schedule while the promotional price discount to that subscriber remains available. It makes no difference to the FCC how many subscribers sign up for the rate offering and receive the promotional price discounts. Rather, the FCC is concerned with how long any one of the subscribers must remain on the schedule while it continues to receive the benefit from the promotion. The durational discussion is directed only to the "temporary short term rate" not to the underlying "standard rate offerings." The temporary rate must last for greater than ninety days (and become long-term temporary) before the restriction on resale comes into effect. The hypothetical rate schedules and rate offerings and illustrations of their impact on retail and wholesale customers' bills attached as an appendix illustrate these points.

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[6] The "ordinary" rate in the rule is synonymous with the "standard" rate in the Local Competition Order.
[7] The "special promotional" rate in the rule is synonymous with the "short term temporary" rate in the Local Competition Order.

II.
A.

Because the one-time checks would have been short term promotions not subject to the resale requirement under § 51.613(a),[8] had they been de jure promotions at all, there was no need for the Commission to analyze the promotions under the "reasonable and nondiscriminatory" test of § 51.613(b):

> (b) With respect to any restrictions on resale not permitted under paragraph(a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and non discriminatory.

Nevertheless, because the Commission misreads the FCC pronouncements by assuming without addressing the distinction between the standard and temporary short term rate under the FCC's rules, its order addresses in its entirety only the reasonable and non discriminatory test and assumes that the burden rests on AT&T to rebut a presumption of unreasonableness and discriminatoriness. Even if this were the appropriate test, the order is still erroneous.

B.

The Commission lists six criteria against which it assesses AT&T's conduct in determining whether AT&T has met the reasonable and nondiscriminatory test. An appropriate assessment of these criteria reveals that five show that AT&T's actions are indeed reasonable and nondiscriminatory and the sixth is irrelevant.

The first criterion is the length of the promotion. As addressed at length above, the promotion is for less than ninety days and presumed reasonable. The second criterion is reseller interest. Only dPi complains. The Commission excuses the disinterest of all other resellers on the basis of pure speculation. The third criterion is lack of causal relationship between AT&T's resale of the promotions and the number of dPi customers. Accurate assessment of this criterion underscores that because AT&T and dPi do not compete, dPi is unaffected by AT&T's providing the promotion to AT&T retail customers and not to dPi so there is no anticompetitive effect.

The fourth factor addresses the extent to which AT&T and dPi compete. Here, the Commission's factual determinations that competition exists are completely at odds with the record evidence and, moreover, as discussed below, display a misunderstanding of the concept of competition. The fifth criterion is whether resale of the promotion to dPi would be discriminatory against all other resellers for whom resale has been restricted. The Commission dismisses the fact that no other reseller would receive money dPi gets by asserting that "there is no evidence that any other CLPs in

[8] dPi presented its case on the assumption that the promotion exceeds ninety days. dPi made no effort to show that AT&T was attempting to avoid its wholesale obligation through the restriction of a short-term promotion by, for example, making available a sequential series of ninety-day promotional rates.

North Carolina are seeking such credits," a determination completely at odds with the Commission's excusing this lack of interest in addressing criterion two. The sixth criterion is that AT&T before its merger with BellSouth and after the merger voluntarily resold the promotions to resellers. This fact is irrelevant.

In its Order Denying Exceptions and Affirming Recommended Order, the Commission majority tacitly acknowledges the illogic of the earlier discussion of these six criteria and employs yet a different tact. Reduced to its essence the majority says the duration of the "promotion" exceeds ninety days and therefore it is ipso facto unreasonable and discriminatory. Assuming the promotional offering exceeds ninety days, under the FCC's Order and Rules, this is not the end of the inquiry into reasonableness and discriminatoriness, only the beginning. Under the Commission majority's logic, the only way an ILEC could show reasonableness and nondiscriminatoriness for a promotion exceeding ninety days would be to show that it lasted for less than ninety days. Obviously, such is not the test.

C.

Assuming the one time subscription incentives are promotions and discount prices in excess of ninety days under the FCC's order and rules, the issue is still whether AT&T's provision of the subscription incentives to its retail subscribers and not to dPi is procompetitive or anticompetitive. Crucial evidence in resolving this issue is that during the period in question, 2003-2007, AT&T did not possess market power, so even if the complainant were not dPi but a traditional post paid CLP, the outcome would be the same. Also, the undisputed testimony of record is that dPi serves a niche market of subscribers that are poor credit risks and are only served by prepaid wireline carriers, like dPi. They are a class of subscribers a postpaid carrier like AT&T is unwilling to serve.

dPi maintains that the subscription incentive programs at issue were in effect for greater than ninety days and that AT&T's restriction on their resale is therefore presumptively unreasonable and discriminatory under the FCC's Local Competition Order and FCC rules implemented thereunder, specifically 47 C.F.R. § 51.613(b). dPi maintains that AT&T has not overcome its presumptive burden by showing reasonableness and nondiscrimination. dPi maintains that AT&T's restrictions on the resale of the subscription incentives constitute predatory pricing and result in a price squeeze against dPi. These are the two anticompetitive practices dPi alleges constitute AT&T's unreasonable and discriminatory practices under the § 51.613(b) analysis.

AT&T's provision of the subscription incentives to its retail subscribers to entice them to sign up with AT&T rather than another carrier gives the subscribers a price break in a competitive market and is the essence of how competition is supposed to work. "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340, 110 S.Ct. 1884, 1892 (1990). Before AT&T's restriction on the resale of the subscription incentives to dPi or any reseller can be anticompetitive, the restriction must unfairly, unreasonably, or unlawfully harm dPi's competitive position. "But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the savings clause's mandate that nothing in the Act 'modify, impair, or supercede the applicability' of the antitrust laws." Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004).

Whether an ILEC's restriction on the resale of promotional offerings is reasonable and nondiscriminatory is measured by the FCC, this Commission in all of its orders on this issue, dPi's complaint and other reported disputes[9] with reference to its pro or anti competitive effect, not some broader metric. While CLPs are customers of the ILEC, they are only wholesale customers and at the same time therefore potential competitors in some retail market. AT&T has resold the standard telecommunications service less the wholesale discount without restriction. AT&T thus has complied with its resale obligations as established by the "more ambitious goals" of TA 96, and the Commission must assess the narrower reasonableness and discriminatoriness test for this particular restriction on more discrete pro or anti-competitive economic principles. dPi itself has identified the economic principles as predatory pricing and price squeeze.

Congress and the federal courts have established the point where a business rival's practices and motives cross the line from procompetitive ones beneficial to consumers to unlawfully anticompetitive ones destructive to competition and therefore proscribed by the antitrust laws. These rulings and pronouncements arise primarily within the context of the Sherman and similar acts. Nevertheless, the rulings and pronouncements address the underlying economic principles descriptive of competition in other contexts, including those at issue in interpreting the FCC's Local Competition Order and FCC rules like 47 C.F.R. § 51.613(b). A rival's conduct that is procompetitive when measured against the proscriptions of the Sherman Act does not become anticompetitive when measured against these FCC pronouncements.

Before any competitor alleging anticompetitive harm can prevail, the competitor must show that it competes with its rival in the same geographic and product market. "A relevant product market is composed of 'commodities reasonably interchangeable by consumers for the same purposes.'" United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 1007 (2004). The undisputed evidence is that dPi and AT&T do not compete in the same product market.

The consumers of dPi's products cannot reasonably interchange them with AT&T's products. AT&T refuses to sell to them. dPi's products have peculiar characteristics and uses in distinction from AT&T's. dPi serves customers distinct from

[9] In re Petition of Image Access, Inc. d/b/a/ NewPhone for Declatory Ruling Regarding Incumbant Local Exchange Carrier Promotions Available for Resale, Joint Comments of ABC Telecom, et al., FCC Docket No. 06-129 filed July 31, 2006 at 5-10; Budget Prepay Inc. et. al., v. AT&T Inc., f/k/a SBC Communications, Inc., et al. Case No. 3:09-cv-1494-p in the US Distric Court, Northern Distric of Texas, Dallas Division.

those of AT&T. The prices of the two carriers are distinct. dPi is a specialized vendor. dPi's customers are not sensitive to AT&T's price changes.

> A market "must include all products reasonably interchangeable by consumers for the same purposes" (citation omitted). Whether one product is reasonably interchangeable for another depends not only on the ease and speed with which customers can substitute it and the desirability of doing so . . . but also on the cost of substitution, which depends most sensitively on the price of the products. A broad market may also contain relevant submarkets which themselves "constitute product markets for antitrust purposes" (citation omitted). "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors" (citation omitted).

Federal Trade Commission v. Whole Foods Market, Inc. 548 F.3d 1028, 1037-1038 (D.C. Cir. 2008).

The undisputed evidence that the two carriers serve different product markets overcomes any presumption established by the FCC. Also, AT&T does not possess market power. dPi asserts that AT&T engages in predatory pricing and is exerting a price squeeze.[10] The burden shifts to dPi to support these claims. dPi's claims of anticompetitive practices fail for any number of reasons. While dPi competes in the prepaid submarket of North Carolina wireline local exchange carriers, AT&T competes in a substantially broader product market served by numerous postpaid CLPs, wireless carriers, VoIP providers, cable providers and internet providers. This pervasive competition constrains AT&T's ability to adjust its retail prices. It is a matter of widespread industry knowledge that AT&T and other North Carolina ILECs have lost significant market share to these competitors over the years and specifically during the 2003 through 2007 timeframe.[11]

On July 9, 2002 in Docket No. P-55, Sub 1022, BellSouth's proceeding to obtain 271 authority to reenter the interLATA long distance business, the Commission found and concluded that BellSouth faced substantial competition in the local exchange

[10] At oral argument dPi back peddled from the claims in its written exceptions. "We are not making a technical legal case of predatory pricing here." However, unless the economic activity in which a rival engages meets some definition of anticompetitive conduct, its activity is lawful, procompetitive and permissible. There is no such thing as a non-technical case of predatory pricing.

[11] dPi's assertions as to appropriate product markets are inconsistent and contradictory. In contrast to record evidence to the contrary dPi asserts that it competes with AT&T in the entire North Carolina wireline local exchange market irrespective of its very high inelastic prices and prepayment requirements. On the other hand, it alleges that AT&T does not compete with wireless, VoIP, internet or cable providers due to price differences and in disregard of this Commission's, the FCC's and the North Carolina General Assembly's determinations to the contrary.

market. July 9, 2002 Order at 252-257. Such competition has only increased thereafter. The 2009 North Carolina General Assembly determined that this local exchange competition had become so pervasive that nearly all of this Commission's regulatory oversight over local exchange carriers could be withdrawn. Consumer Choice and Investment Act of 2009, 2009 N.C. Sess. Law Ch. 238. The inescapable conclusion to be drawn from this is that during 2003-2007 and thereafter AT&T lacked market power in the North Carolina local exchange market so as to enable it to exert sufficient economic control as to effectuate any of the anticompetitive practices alleged by dPi or any other such practices that dPi or another CLP might list.

The Telecommunications Act of 1996 did not create any new claims for relief based on anticompetitive conduct that did not already exist. The elements of assertions of predatory pricing and price squeeze are well established. dPi fails in supporting these elements in a number of ways.

With respect to predatory pricing, a complainant alleging injury from a rival's low prices must prove that the prices complained of are below an appropriate measure of the rival's costs. Brooke Group Ltd. v. Brown Williamson Tobacco Corporation, 509 U.S. 209, 223 (1993). Secondly, the claimant must prove that the competitor had a dangerous probability of recouping its investment in below cost pricing. Id. at 226; Matsushita Electric Industrial Company v. Zenith Radio Corporation, 475 U.S. 574, 590-591 (1986). The predatory scheme must cause a rise in prices above the competitive level that would be sufficient to compensate the amounts expended in the predation. Id.

No evidence exists that during 2003–2007 while AT&T was providing subscription incentives to its retail subscribers while withholding them from dPi, AT&T was serving its retail subscribers below AT&T's costs. dPi concedes this. July 12, 2010 transcript, p. 66. dPi claims that AT&T charges low prices only in the first month. Id. at 18, 64. AT&T stresses that it provides the one time subscription incentive with the objective of retaining the customer and profiting from its continued business. Id. at 39, 40.

Likewise, there is no evidence that, thereafter, AT&T raised its prices to its retail customers above competitive levels to recoup any previous losses. Without market power in the local exchange market, AT&T had no ability to do so. "In order to recoup their losses, [predators] must obtain enough market power to set higher competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices." Matsushita, 475 U.S. at 590-591.

As with predatory pricing, the courts have identified the elements of an actionable claim for the harmful anticompetitive practice whereby one competitor exercises a price squeeze against another. "A firm with market power in the upstream market can squeeze its downstream competitor by raising its wholesale price of inputs while cutting its own retail prices. This raises the competitor's costs (because they will have to pay more for the inputs) and lower their revenues (because they have to match a dominant firm's low retail price)." Pacific Bell Telephone Co. v. Linkline Communications, Inc., 124 S. Ct. 1109, 1118 (2009).

dPi claims that AT&T left its wholesale price at the level existing before providing the subscription incentives to AT&T's retail subscribers and lowered its retail price one time each for some of AT&T's retail subscribers. For AT&T to be subject to a dPi claim for a price squeeze because AT&T raised its wholesale price to dPi, AT&T must have a duty to deal with dPi on terms established by the federal courts. However, the U.S. Supreme Court has determined that in the business relationship that exists between dPi and AT&T whereby AT&T's provision of service to dPi arises from statutory and regulatory requirements, AT&T has no duty to deal with dPi as that requirement exists for purposes of fulfilling this element of an actionable anticompetitive claim. Pacific Bell Telephone Company v. Linkline Communications, Inc., 124 S. Ct. 1109 (2009); Verizon Communications, Inc. v. Trinko, 540 U.S. 398 (2004). AT&T's initial provision of service to dPi was not voluntary. Accordingly, AT&T's failure to lower its wholesale prices to CLPs like dPi cannot qualify as conduct violative of the first element of a price squeeze prohibition.

Additionally, dPi is not required to and does not lower its prices to dPi's retail customers to match AT&T's retail price reductions. AT&T and dPi serve different retail markets where dPi's subscribers cannot qualify for AT&T's retail services with or without the subscription discount.

dPi's claim is that it is damaged from AT&T's alleged anticompetitive conduct through loss of net revenues or profits because AT&T has not reduced dPi's inputs to dPi's business of providing local exchange service, not from conduct causing dPi to lower its prices to its customers. The harm dPi claims is that arising from lawful competition not from actionable anticompetitive harm. The U.S. Supreme Court's admonition in Linkline is instructive: "For if AT&T can bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of business by pricing them out of the market." Linkline, 129 S. Ct. at 1123.

III.

A.

The issue has arisen of whether the Commission in Docket No. P-100, Sub 72 ruled that the subscription incentive portion of the 1FR + 2 Cash Back offering was in fact a promotion addressed by the Local Competition Order and the FCC rules and whether the Fourth Circuit's affirmance of the Commission's orders in Sanford[12] makes such Commission rulings binding on the Commission in this docket. The short answer is that whether the Commission ruled the offerings promotions and the Fourth Circuit affirmed this specific determination makes no difference. If the offerings are promotions under the Local Competition Order and FCC rules, as discussed in detail above, they are for less than ninety days and AT&T is free to restrict their resale to CLPs. If they

[12] BellSouth Telecommunications Inc. v. Sanford, 494 F.3d 439 (2007).

are not promotions as so defined, they are of even less potential anticompetitive harm to resellers, and the case for AT&T's ability to restrict their resale becomes even stronger.

B.

The longer answer is that the Fourth Circuit's holding in Sanford is limited to affirmance of the Commission's authority to require resale of promotions as items of value affecting the price of the telecommunications services. It is correct that at one point in P-100, Sub 72 the Commission concludes that the offerings are promotions under the Local Competition Order and FCC rules. Docket No. P-100, Sub 72b, Order of December 22, 2004, p. 9. In addition, however, the Commission clearly concludes that the offerings are only de facto offerings and not de jure ones. The promotions cannot be covered by the FCC's pronouncements and not covered at the same time. To the extent the majority in Sanford would have affirmed the Commission in its entirety it would have affirmed both conclusions, inconsistent though they be.

In my view the Commission significantly misread and misinterpreted the FCC's pronouncements in Docket No. P-100, Sub 72 on the topic of promotional offerings, and the Fourth Circuit did not condone this error.[13] The FCC's pronouncements issued in 1996 are limited exclusively to tariffed rates or de jure offerings. This conclusion arises from careful reading of the Local Competition Order and becomes even clearer upon review of FCC rule 51.613. The term "rate" is used six times. The Commission was 180 degrees off line when it concluded that when the FCC addressed promotional offerings in its pronouncements, the FCC was addressing de facto offerings.

The FCC contrasted standard offerings from several categories of nonstandard offerings such as temporary offerings and customer specific offerings. Nowhere does

[13] The Local Competition Order and 47 C.F.R. § 51.613 address exclusively tariffed rates. The Commission in Docket No. P-100, Sub 72 misinterpreted the FCC pronouncements, mischaracterizing "nonstandard" for "de facto". "The Commission interprets ¶ 948 of the FCC's Local Competition Order to mean that an ILEC's duty to resell telecommunications services it offers at retail does not exclude promotional offerings ... The FCC was concerned that ILEC promotions could be de facto offerings that would not be available to resellers and would therefore undercut the duty to resell retail services to resellers at wholesale rates." P-100, Sub 72b, Order of December 22, 2004, p. 9. The Fourth Circuit majority sidestepped this erroneous Commission conclusion: "[T]he NC Commission did not decide how to treat any particular incentive or promotion. Rather it established guidelines similar to those given by the FCC in the Local Competition Order." Sanford at 453.

Chief Judge Williams in her concurrence called the majority on this point: "I respectfully disagree with the portion of the majority opinion suggesting that the NCUC did not resolve whether the special offers at issue in this case are 'promotions' within the meaning of 47 C.F.R. § 51.613(a)(2)(2006) but rather independently 'established guidelines similar to those given by the FCC in its Local Competition Order.'" Id. at 454. She addressed the issue directly: "I agree with the district court that the FCC's Local Competition Order limits the scope of the term 'promotions' and therefore forecloses the interpretation adopted by the NCUC." Id. at 455-56. The concurrence directly addresses the Commission's conclusion and rejects it. The majority avoids addressing the conclusion. The Sanford case does not affirm the Commission's conclusion that the FCC treats promotions like 1FR + 2 Cash Back as promotions subject to resale.

the FCC refer to de facto offerings, nor does it contrast standard offerings with any off tariff offering. De facto offerings did not exist in 1996, and the FCC did not address them.

The Commission's logic in Docket No. P-100, Sub 72 is contradictory and circular. On the one hand the Commission concludes that the promotions are not part of the standard or de jure telecommunications services over which it has jurisdiction but only a de facto item of value giving the Commission indirect jurisdiction or jurisdiction by implication. On the other hand, the Commission concludes that the FCC's pronouncements directly address the promotions and provide binding authority over whether the ILEC can restrict their resale. These determinations are completely inconsistent. If the FCC's pronouncements constitute binding authority, this is all the authority the Commission needs, and discussion of de facto telecommunications services is surplusage and unnecessary.

The correct analysis is that the FCC was not addressing de facto, off tariff offerings like the promotions at issue, and the Commission was required to establish its jurisdiction over the offerings by its discussion of the indirect effect of the offerings on the price of the telecommunications services.

Then the issue arises as to whether the Fourth Circuit majority's affirmance of the Commission's determinations affirmed as a matter of law or as the law of the case that the FCC's pronouncements address de facto promotional offerings because the Commission arrived at this conclusion in the orders affirmed. I conclude that the Fourth Circuit majority affirmed no such erroneous conclusion. The Commission's orders contain illogical and inconsistent determinations. The federal district court found both conclusions erroneous as a matter of law. The district court found that the promotional offerings did not constitute telecommunications services.[14] Likewise, the district court found that the FCC's pronouncements did not address the de facto promotional offerings at issue before the Commission.

The Fourth Circuit majority listed both of the district court's holdings but proceeded to address only the first. Sanford at 444. The majority in Sanford never directly addresses the issue of whether the offerings are promotions as addressed by the FCC. Sanford at 449-454, §§ IV – V. Its discussion supports its conclusion that the offerings are "items of value" and part of the price paid for the underlying telecommunications services. Id. In the majority's view it is unclear what the FCC specifically intended in its pronouncements. Id. at 452. The majority classifies the Commission' guidance in P-100, Sub 72 to be only within "the parameters of" or "in harmony with" the FCC's objectives. Id. The majority states that the Commission's guidance is only "similar to" the FCC's pronouncements. Sanford at 453.

In my view, what the majority had in mind here was the fact that having classified the offerings only de facto, the Commission could not at the same time conclude that in every other respect the Commission was attempting to follow the FCC's guidance to the

[14] BellSouth Telecommunications Inc. v. Sanford, 2006 WL 1367379 (W.D.N.C.).

letter. Another possibility is that the majority was acknowledging that the Commission in P-100, Sub 72 gave guidance as to factors it would consider in addition to those listed by the FCC in assessing whether ILEC restriction on resale of promotions was reasonable and non-discriminatory under 47 C.F.R. § 51.613(b). It is erroneous to conclude that the Fourth Circuit majority was affirming Commission conclusions that the subscription incentives were promotions as defined by the FCC. Resolution of this issue was unnecessary to affirm the Commission's determination that it possessed the authority to require resale. The Commission's order under review was a generic, rulemaking or legislative one without any specific wholesale customer dispute at issue.

Careful reading of Chief Judge William's decision concurring in part helps to clarify what the majority intended. Judge Williams is of the unequivocal opinion that the offerings are not promotions as defined by the FCC and explains her reasoning in detail. Sanford at 455-457. Nevertheless, she describes the majority's discussion of this issue to the extent inconsistent with hers to be no more than a "suggestion" (Sanford at 454), which of course, is several degrees inferior to and less binding than a holding. Judge Williams has only a majority suggestion from which to disagree, not a holding from which to dissent. All this to support the conclusion that the Fourth Circuit majority did not by its ruling intend to establish as precedent that the 1FR + 2 Cash Back offerings are promotions addressed by the FCC.

Up until this point in this long running dispute, the issue of whether the subscription incentive portion of 1FR + 2 Cash Back offering is a de jure promotional offering lasting for longer than ninety days has only been directly addressed by Judge Mullen of the District Court, Judge Williams of the Circuit Court and by my dissenting opinions. Each of those opinions concludes that the subscription incentive aspect of the offering is not a promotion as defined by the FCC and/or is available to subscribers for less than ninety days. In this case the Commission no longer is in the generic, legislative realm where it provides guidance as to how it will resolve discrete disputes in future adjudicatory dockets. In this docket the Commission has a concrete controversy between two litigants, and the outcome of their dispute over compensation depends in large measure on how to classify the subscription incentive and whether it lasts for ninety days or less or not. In my view the majority has failed to fulfill its responsibility by failing fully to address this issue. It would seem that if there were merit in an opinion that the promotions exceed ninety days, those in support of that view could undertake to address these conclusions head on instead of assuming without addressing the issue or arguing that the issue has been decided by implication or by default. The repeated need to describe the subscription incentives as "one time incentives for more than ninety days" or "when the one-time nature of the inducement is balanced against ... the length of time the inducements are offered to potential customers" to stretch a one-time payment into a recurring benefit exceeding ninety days is a telling indication that something is amiss.

\s\ Edward S. Finley, Jr.
Chairman Edward S. Finley, Jr.

Illustrative Rate Schedules

Scenario 1

AT&T rate schedule – 1FR + 2 Features Rate Discount (3 month price discount)

Requirements:

Subscriber must sign up for one residential access line and two features such as voice mail, call waiting or call forwarding.

Rate:

$50 per month flat rate.

Rate discount:

$30 per month for months 1-3 of service under this rate schedule.

Term of rate schedule:

AT&T commits to maintain schedule's availability for 3 years.

Availability:

Any subscriber who establishes credit worthiness.

Question:

Can AT&T restrict resale of the rate discount to dPi (or any reseller) and refuse to pay dPi any portion of the $90 ($30/month x 3 months) for dPi customers who sign up for a dPi rate schedule with comparable requirements?

Answer:

Yes. Pursuant to FCC rule 51.613(a)(2) the duration of the rate discount is for ninety days or less (short term promotions). "We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation." ¶949 FCC's Local Competition Order.

Length of the term of the rate schedule (i.e., 3 years) immaterial in determining whether resale of rate discount can be restricted. Length of time customer receives the special promotional rate (i.e., 3 months or 90 days) is the determinative factor.

Scenario 2

AT&T rate schedule – 1FR + 2 Features Rate Discount (4 month price discount)

Requirements:
Subscriber must sign up for one residential access line and two features such as voice mail, call waiting or call forwarding.

Rate:
$50 per month flat rate.

Rate discount:
$30 per month for months 1-4 of service under this rate schedule.

Term of rate schedule:
AT&T commits to maintain schedule's availability for 3 years.

Availability:
Any subscriber who establishes credit worthiness.

Question:
Can AT&T restrict resale of the rate discount to dPi (or any reseller) and refuse to pay dPi up to $120 ($30/month x 4 months) for dPi customers who sign up for a dPi rate schedule with comparable requirements?

Answer:
No. Pursuant to FCC rule 51.613(a)(2), because the duration of the rate discount is for more than ninety days, AT&T cannot restrict resale unless AT&T demonstrates that the restriction is reasonable and nondiscriminatory pursuant to 51.613(b).

Length of the term of the rate schedule (i.e., 3 years) immaterial in determining whether resale of rate discount can be restricted. Length of time customer receives the special promotional rate (i.e., for 4 months or 120 days) is the determinative factor.

Scenario 3

AT&T rate schedule – 1FR + 2 Cash Back

Requirements:

Subscriber must sign up for one residential access line and two features such as voice mail, call waiting or call forwarding.

Rate:

$50 per month flat rate.

De Facto subscription incentive:

$30 check upon subscription.

Term of rate schedule:

AT&T commits to maintain schedule's availability for 3 years.

Availability:

Any subscriber who establishes credit worthiness.

Question:

Can AT&T restrict resale of the $30 check (or the value thereof) to dPi (or any reseller) and refuse to pay dPi any portion of the $30 for dPi customers who sign up for a dPi rate schedule with comparable requirements?

Answer:

Yes. Pursuant to the NCUC's reliance upon FCC rule 51.613(a)(2) the duration of the subscription incentive is for ninety days or less. "We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation." ¶949 FCC's Local Competition Order.

Length of the term of the rate schedule (i.e., 3 years) immaterial in determining whether resale of rate discount can be restricted. Length of time the customer receives the special promotional "item of economic value" (i.e., 3 months or 90 days) is the determinative factor.

Scenario 1
(3 month discount that is not available for resale)

	Month 1	Month 2	Month 3	Month 4	Month 5	...	Month 36
Standard retail rate	$50	$50	$50	$50	$50		$50
Rate discount	$30	$30	$30	-	-		-
Temporary (nonstandard) short term rate – to ATT retail customer	$20	$20	$20	-	-		-
Wholesale discount factor 80% x $50	$40	$40	$40	$40	$40		$40
Rate to wholesale customer	$40	$40	$40	$40	$40		$40

Scenario 2
(4 month discount that is available for resale)

	Month 1	Month 2	Month 3	Month 4	Month 5	...	Month 36
Standard retail rate	$50	$50	$50	$50	$50		$50
Rate discount	$30	$30	$30	$30	-		-
Temporary (nonstandard) long term rate – to ATT retail customer	$20	$20	$20	$20	-		-
Wholesale discount factor 80% x $20	$16	$16	$16	$16	$40		$40
Rate to wholesale customer	$16	$16	$16	$16	$40		$40

<u>Scenario 3</u>
(One-time Cash Back)

	Month 1	Month 2	Month 3	Month 4	Month 5	... Month 36
Standard retail rate	$50	$50	$50	$50	$50	$50
One-time check	$30	-	-	-	-	-
Temporary (nonstandard) short / long term rate – to AT&T retail customer	-	-	-	-	-	-
Net rate to AT&T retail customer	$20	$50	$50	$50	$50	$50
Appropriate wholesale rate paid to AT&T by reseller or net price for reseller	$40	$40	$40	$40	$40	$40
not						
Wholesale rate paid to AT&T by reseller or net price for reseller as argued by dPi	$16	$40	$40	$40	$40	$40

One-time checks are not per se or de jure offerings because not a reduction to the tariffed rate. (NCUC Order P-100, Sub 72). Only an item of "economic value." Have lesser degree of anti-competitive effect.

Section 51.613(a)(2) & Local Competition Order do not broadly encompass "anything of economic value, but instead contemplate only "temporary price discounts" giving rise to special promotional rates." <u>Sanford</u> Concurrence, p. 456.